131-15

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 226.

WALLACE DOUGLASS, PLAINTIFF IN ERROR,

vs.

CHARLES W. LEWIS AND JESSIE A. LEWIS, HIS WIFE.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED FEBRUARY 25, 1886.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of the Territory of New Mexico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in the said supreme court of the Territory of New Mexico, before you, in a suit between Wallace Douglass, appellee, and Charles W. Lewis and Jessie A. Lewis, appellants, a manifest error has intervened, to the great damage of the said Wallace Douglass, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done
2 therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the tenth day of February, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal Supreme Court, Territory of New Mexico.]

C. M. PHILLIPS,
Clerk Supreme Court, Territory of New Mexico.

3 UNITED STATES OF AMERICA, *Territory of New Mexico:*

I, C. M. Phillips, clerk of the supreme court of the Territory of New Mexico, hereby make return to the within writ by annexing thereto an authenticated transcript of the record and proceedings in said cause, together with a copy of the opinion of the judges of said supreme court.

Witness my hand and the seal of said court this 17th day of February, 1886.

[Seal Supreme Court, Territory of New Mexico.]

C. M. PHILLIPS, *Clerk.*

4 Supreme Court of the Territory of New Mexico.

WALLACE DOUGLASS, Plaintiff in Error,

vs.

CHARLES W. LEWIS and JESSIE A. LEWIS, Defendants in Error.

Be it remembered that heretofore, to wit, on the twenty-second day of December, A. D. 1884, there was filed in the office of the

clerk of the supreme court of the Territory of New Mexico the following transcript of record of the district court of the second judicial district of said Territory within and for the county of Bernalillo in the above-entitled cause, which said transcript was and is in the words and figures following, to wit:

5 *Transcript.*

In the Supreme Court of the Territory of New Mexico. January Term, 1885.

WALLACE DOUGLASS, Plaintiff and Appellee,
vs.
CHARLES W. LEWIS *et al.*, Defendants and Appellants. } No. —.

Covenant.

Appeal from Bernalillo district court, second judicial district.

Stone & Stone and Fiske & Warren, attorneys for plaintiff and appellee; Stearns & Douglas and S. M. Barnes, attorneys for defendants and appellants.

TERRITORY OF NEW MEXICO,
Second Judicial District, County of Bernalillo, } *ss:*

6 WALLACE DOUGLASS, Plaintiff and Appellee,
vs.
CHARLES W. LEWIS *et al.*, Defendants and Appellants. } No. —.

Be it remembered that heretofore, to wit, on the 11th day of September, A. D. 1883, there was filed in the office of the clerk of the district court of the Territory of New Mexico for the second judicial district and county of Bernalillo a declaration in the words and figures following, to wit:

(*Declaration.*)

TERRITORY OF NEW MEXICO,
County of Bernalillo, } *ss:*

In the District Court for the Second Judicial District of the Territory of New Mexico, Sitting in and for the County of Bernalillo for the Trial of Causes Arising under the Laws of the Territory, at the October Term, A. D. 1883.

To the Hon. Joseph Bell, justice of the supreme court of the Territory of New Mexico and judge of the second judicial district court thereof:

Your petitioner, Wallace Douglass, a resident of the county of Bernalillo and Territory of New Mexico, complains of Charles W.

Lewis and Jessie A. Lewis, wife of the said Charles W. Lewis,
7–10 residents of the county of Bernalillo and Territory of New Mexico, in a plea of breach of covenant—

For that whereas heretofore, to wit, on the 13th day of May, A. D. 1882, at, to wit, the county of Bernalillo aforesaid, by their deed bearing date of that day and now to the court here shown, for the consideration therein mentioned, did convey and warrant to the plaintiff, his heirs and assigns, in fee simple, certain real estate situate in the county aforesaid, to wit, a certain tract or parcel of land lying and being in Las Lagunitas and described as follows, to wit: On the north by lands of James Murphy; on the south by lands of Charles W. Lewis; on the east by the base of the sand hills, and on the west by the Rio Grande, being four thousand seven hundred and eleven (4,711) feet from east to west and one thousand four hundred and ninety (1,490) feet from north to south, and containing one hundred and sixty acres (160), together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

And the defendants did by their said deed, for themselves, their heirs, and personal representatives, covenant with the plaintiff, his heirs, and assigns, amongst other things, that at the time of the making, ensealing, and delivery of said deed and "at the time of the execution of said conveyance" they, the said defendants, were lawfully seized of an indefeasible estate and in possession of a title in fee simple in and to the said property, and then had good right and full power to convey the same. Nevertheless plaintiff avers that the said tract of land in said deed described and by said defendants bar-
gained and sold to said plaintiff was not the property of said
11 defendants, and at the time of the making and delivery of said deed they, the said defendants, were not lawfully seized of an indefeasible estate in fee simple in and to said real estate, nor had they then good right and full power to convey the same, but, on the contrary thereof, the Government of the United States had at the time of the making and delivery of said deed and still has lawful right and title to said real estate.

And plaintiff avers that in consideration of the conveyance and sale of said lands in said deed described and set forth he paid to said defendants the sum of five thousand three hundred and thirty-three dollars and thirty-three cents ($5,333.33); that he, said plaintiff, has further expended and laid out large sums of money in building houses upon and improving said land, to wit, four thousand dollars ($4,000).

And so the plaintiff says that they, said defendants, have not kept the said covenants according to the true intent and meaning of said deed and according to the statute in such case made and provided, but have broken the same, to the damage of plaintiff in the sum of ten thousand dollars ($10,000).

Wherefore he brings his suit and asks judgment of this honorable

court for the said sum of ten thousand dollars ($10,000), together with interest and costs of suit.

STONE & STONE,
Att'ys for Plaintiff.

And thereupon there was duly issued by said clerk a summons in the words and figures following, to wit:

(*Summons.*)

The Territory of New Mexico to the sheriff of Bernalillo county, Greeting:

12 You are hereby commanded to summon Charles W. Lewis and Jessie A. Lewis, his wife, to be and appear before the district court for the second judicial district of the Territory of New Mexico on the first day of the next October, 1883, term thereof, to be begun and held within and for the county of Bernalillo, at the court-house of said county, on the first Monday of October, A. D. 1883, then and there to answer unto Wallace Douglass in the plea of covenant, damages ten thousand dollars, with interests and costs of suit, and have you then and there this writ.

Witness the Honorable Joseph Bell, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial district thereof, and the seal of said district court this 11th day of Sept., A. D. 1883.

[Seal 2d Dist. Court.]

EDMUND H. SMITH, *Clerk.*

(Endorsed.)

This is an action of covenant to recover damages for breaches of warranties in a certain deed of real estate situated in Las Lagunitas, made by defendants to plaintiff on 13 May, 1882; amount of damages claimed ($10,000), with interests and costs.

EDMUND H. SMITH, *Clerk.*

Which was thereafter returned to and filed in the office of the said clerk on the 27th day of September, A. D. 1883, with the return of service thereon in the words and figures following, to wit:

(*Return.*)

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

13 I hereby certify that on this the 17th day of Sept., A. D. 1883, in this my county, I served the within summons on the within-named defendants, Chas. W. Lewis and Jessie A. Lewis, his

wife, by leaving with each of said defendants a true copy of said summons with a certified copy of declaration filed in said cause.

PERFECTO ARMIJO, *Sheriff*,
By E. S. HOWE, *Deputy*.

And thereafter was filed, on the 1st day of October, 1883, in the office of the said clerk by said defendants, a demurrer in the words and figures following, to wit:

(*Demurrer.*)

In the District Court of the Second Judicial District of the Territory of New Mexico within and for the County of Bernalillo. October Term, A. D. 1883.

WALLACE DOUGLASS, Pl't'ff, *vs.* CHARLES W. LEWIS *et al.*, Def'ts.

Demurrer to declaration.

And the defendants, by Stearns & Douglas, their attorneys, come and defend the wrong and injury when, etc., and crave oyer of the said supposed deed and covenants in the said declaration mentioned, and they are read to them.

They also crave oyer of the condition of the said supposed deed and covenant, and they are read to them in these words, see Exhibit "A" hereto attached, which being read and heard the defendants say that the said declaration and the matters therein contained in manner and form as the same are above pleaded and set forth are not sufficient in law, and this they are ready to verify, &c.

STEARNS & DOUGLAS,
Of Albuquerque, N. M., Att'ys for Def'ts.

14 And there was also filed, on the said 1st day of October, 1883, in the office of the said clerk by said defendants, pleas in the words and figures following, to wit:

(*Pleas.*)

TERRITORY OF NEW MEXICO, } *ss*:
County of Bernalillo, }

In the District Court of the Second Judicial District, Sitting in and for the County of Bernalillo, Territory of New Mexico, for the Trial of Causes Arising under the Laws of the Territory, at the October Term, A. D. 1883.

WALLACE DOUGLASS
vs.
CHARLES W. LEWIS *et al.* } No. 975.

Pleas.

And now come the said defendants, by Stearns & Douglas, their attorneys, and defend the wrong and injury when, &c., and say that

the said supposed deed in the said declaration mentioned is not their deed, and of this they put themselves upon the country, etc.

And, for a further plea in this behalf, the defendants say that the plaintiff ought not to have his aforesaid action against them, the defendants, because they say that it is not true, as plaintiff hath alleged in his declaration, that these defendants in the said supposed deed covenanted with him, the said plaintiff, that they, at the time of the making and ensealing of the said supposed deed and the delivery of the same *that they, the said defendants*, were lawfully seized of an indefeasible estate and in possession of a title in fee simple in and to the said real property, and that they then had good right and full power to convey the same, and they do here especially deny the same.

And, further, defendants say that it is not true, as plaintiff
15 hath in his declaration averred, and they here especially deny the same, wherein he, the plaintiff, avers that the said tract of land in the said supposed deed described, as by these said defendants bargained and sold unto said plaintiff, was not the property of these defendants, and that at the time of making and delivery of said supposed deed they, the said defendants, were not lawfully seized of an estate in fee simple in and to said real estate, and that they then had good right and full power to convey the same, and therefore these defendants here especially deny the same.

Defendants further say it is not true, as plaintiff hath in his said declaration averred, that at the time of the said supposed deed nor at any time since nor at the present time *that* the Government of the United States has or had any lawful right or title in or to said real estate, and they especially here deny the same.

Defendants further deny that which plaintiff hath in his declaration averred wherein he says that he, plaintiff, hath expended and laid out large sums of money in building houses upon and in improving said lands, to wit, four thousand dollars, or any amount.

Defendants say that it is not true, as alleged and stated by plaintiff in his declaration, that they, "these defendants," have not kept the said covenant and each and every covenant in the said deed contained according to the true intent and meaning of the said deed and according to the statute in such cases made and provided nor that they have broken the same to the damage of plaintiff in the sum of ten thousand dollars ($10,000) nor in any sum, and they especially deny the same.

And of this the defendants put themselves upon the country, and pray that they may be discharged hence, and that they may
16 be awarded judgment against plaintiff for costs of such and damages in this behalf most unjustly expended.

STEARNS & DOUGLAS,
Att'ys for Def'ts, Albuquerque, N. M.

And thereafter was filed, on the 19th day of October, A. D. 1883, in the office of the said clerk by the said defendants, an amended special demurrer in the words and figures following, to wit:

(*Amended Special Demurrer.*)

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting within and for the County of Bernalillo. October Term, A. D. 1883.

WALLACE DOUGLASS, Pl'ff,
vs.
CHARLES W. LEWIS *et al.*, Def'ts. } No. 975.

Amended special demurrer to declaration.

And the defendants, by Stearns & Douglas, their attorneys, come and defend the wrong and injury when, &c., and crave oyer of the said supposed deed and covenants in the said declaration mentioned, and they are read to them.

They also crave oyer of the conditions of the said supposed deeds and covenants, and they are read to them, which being read and heard the defendants say that the said declaration and the matters therein contained in manner and form as the same are above pleaded and set forth are not sufficient in law for the plaintiff to maintain his aforesaid action, and that they, the defendants, are not bound by law to further answer the same.

And the defendants show to the court here the following causes of demurrer to the said declaration—that is to say, that the
17 said deed upon oyer contains no such covenant as the one alleged in the said declaration of the plaintiff—that is to say, that the said deed having some express covenants therein contained, and among which is not the covenant declared upon in the said plaintiff's declaration, to wit, no covenant of seisin, or "that the said covenantors were at the time of making the said deed seized of an indefeasible title in fee simple" to the lands conveyed, and, inasmuch as the parties have fully expressed their intention and agreements at the time of making the said deed by the express covenants therein contained, there can be none added by construction or otherwise; and, further, defendants say the said declaration alleges no eviction, and therefore he, the said plaintiff, ought not to have and maintain his said action, and they, the said defendants, are not bound by law to answer the same, and this *he is* ready to verify; wherefore, for want of a sufficient declaration in this behalf, the defendants pray judgment, and that the plaintiff may be barred from maintaining his aforesaid action, and also that the said declaration is in other respects uncertain, informal, and insufficient, etc.

STEARNS & DOUGLAS,
Of Albuquerque, New Mexico, Att'ys for Def'ts.

At a regular term of the district court of the second judicial district of the Territory of New Mexico, begun and held in and for the county of Bernalillo, at the court-house in said county, on the 1st day of October, A. D. 1883, the following proceedings, among

others, were had on the thirtieth day of said term, it being the 3d day of November, A. D. 1883.

Present, the Honorable Joseph Bell, associate justice of the
18 supreme court of the Territory of New Mexico and judge of the second judicial district court thereof.

(*Judgment Overruling Demurrer.*)

WALLACE DOUGLASS
vs.
CHARLES W. LEWIS *et al.* } No. 975.

Covenant.

The issue of law raised by the demurrer to the declaration herein having come on duly to be tried by the court, it is now, after argument and due advisement had, ordered and adjudged that said demurrer be, and it is hereby, overruled, with leave, however, to the defendants to plead over.

And thereafter was filed, on the 8th day of January, 1884, in the office of the said clerk, an opinion of the district judge in the words and figures following, to wit:

(*Opinion of the Court.*)

TERRITORY OF NEW MEXICO,
County of Bernalillo, Second Judicial District:

WALLACE DOUGLASS *vs.* CHARLES W. LEWIS *et al.*

Covenant.

BELL, *J.:*

This is an action brought for alleged breach of covenant by the defendants.

From the declaration it appears that on the 13th day of May, 1882, by their deed bearing date on that day, the defendants conveyed to the plaintiff and his heirs certain land situated in the county of Bernalillo.

The deed is referred to fully in the declaration, and a copy of it is filed with the clerk of the court. An examination of the deed shows
19 that it is a bargain and sale deed, and that it also contains a covenant of warranty in the usual form by which the grantors covenant for themselves and their heirs "the before-described and hereby granted and released premises and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said parties of the first part and their heirs and assigns, and against all and every person and persons whomsoever lawfully claiming or to claim the same or any

part thereof shall and will warrant and forever defend." By the statute of the Territory the words "bargained and sold" are made to create a covenant "that the conveyer at the time of the execution of the said conveyance is in possession of a title in fee simple to the property so conveyed."

Prince's Laws, 234, sec. 3.

This, in effect, creates a covenant of seisin, and it is for a breach of this covenant that the plaintiff has brought this action. A demurrer is interposed to the declaration, and the grounds assigned are "that the deed in question contains no such covenant of seisin as the one alleged in the declaration, but that, having some express covenants therein, the parties have fully expressed their intention and agreement at the time of the making of said deed by these express covenants and that no eviction is charged in the declaration." As I have already decided in the case of Armijo *vs.* The New Mexico Town Co., it is not necessary in an action for breach of covenant of seisin to aver eviction or even assertion of paramount or a better title, but that such a covenant is broken as soon as it is made.

The only question left for the court to pass upon is whether, in a deed which contains, as this one does, an express covenant of warranty, any other covenant such as the implied covenant of seisin created under the statute can be considered as binding upon the grantor.

It is perfectly well settled that there can be both express and implied covenants in a deed and both be good. 3 Washburn, 4th Ed., 485.

An express covenant supersedes and controls an implied one when it relates to the same subject-matter of covenant, but the covenants of seisin and warranty are wholly different and independent of each other. The grantor might be very willing to warranty against an outstanding title of which he has knowledge, but the assertion of which he has no fear will ever be made, and he might also be willing to covenant for quiet enjoyment because of his belief that the possession of his grantee will never be disturbed.

The covenant of seisin, however, is *in præsenti*, and is a covenant of a totally different character. It is that the grantor at the time of the execution of the conveyance is in possession of a title.

In the case of Alexander *vs.* Schreiber, 10 Mo., 460–'66, the court says: "While it is settled that a special covenant will restrict a general one, where the two are absolutely irreconcilable, yet the courts have inclined very much to let both stand. Where the particular covenants and the general covenant are entirely independent of each other and of a different character they will all stand."

So in Iowa, where the grantor's deed contained the words "grant, bargain, and sell," and a covenant was added to release and defend the premises against all persons claiming under him, it was held that the former words amounted to an express covenant and that the latter covenant did not restrict their effect. Brown *vs.* Tomlinson, 2 Green, 525.

So also in Illinois, where the words in the deed were "grant, bar-

gain, and sell," which were held to constitute an express cov-
21 enant, and these were followed by an express covenant "that the heirs, executors, administrators, and assigns should defend the title against all persons." It was not held to limit the general express covenant which preceded it. *Vide* 3 Washburn, 485–'87.

In the case at bar I am of opinion that the express covenant of warranty is independent of the covenant of seisin implied by the statute, and that an action may be maintained upon the latter, and can only be met by plea and proof of good title in the grantor at the time of the execution of the deed.

The demurrer is overruled with leave to the defendants to plead within thirty days of the time of the filing of this opinion.

And thereafter and on the 16th day of May, 1884, there was filed in the office of the said clerk by the said defendants pleas of seisin and covenants, &c., in the words and figures following, to wit:

(*Pleas of Seisin and Covenant.*)

TERRITORY OF NEW MEXICO:

In the District Court of the County of Bernalillo, at the May Term, 1884.

WALLACE DOUGLASS, Plaintiff,

vs.

CHARLES W. LEWIS and his Wife, JESSIE A. LEWIS, Defendants.

Covenant.

And the said defendants, Charles W. Lewis and his wife, Jessie A. Lewis, by their attorneys, Stearns & Douglas and S. M. Barnes, come and defend the wrong and injury when, &c., and, by leave of the court first had and obtained and for further plea, say that the said plaintiff ought not to have or maintain his aforesaid action thereof against the said defendants, because they say that the said defendant, Charles W. Lewis, husband of the said defendant, Jessie A. Lewis, at the time of the making and delivery of the said
22 deed in the said declaration mentioned, was seized and possessed of the said real estate and premises in the said declaration mentioned, and then had good right and full power and authority to convey the said real estate and premises according to the form and effect of the said deed and of the said covenant of the said defendants by them in that behalf made as aforesaid, at, to wit, the county of Bernalillo aforesaid, and of this the said defendants put themselves upon the country, &c.

STEARNS & DOUGLAS AND
S. M. BARNES, *Att'ys for Def'ts.*

And, for a further plea, by leave of the court first had and obtained, in this behalf, these defendants, Charles W. Lewis and his wife, Jessie A. Lewis, say that the plaintiff ought not to have his aforesaid action against them, the said defendants, because they say that they, the said defendants, "were lawfully seized of an indefeasible estate and in possession of a title in fee simple in and to the said real property, and then had good right and full power to convey the same" according to the form and effect of the said indenture and of the said covenant by the said defendants in that behalf made as aforesaid, at, to wit, the county of Bernalillo aforesaid, and of this these defendants put themselves upon the country.

STEARNS & DOUGLAS AND
S. M. BARNES, *Att'ys for Def'ts.*

And thereafter and on the 20th day of May, 1884, there was filed in the office of the said clerk by the said plaintiff a demurrer to first plea in the words and figures following, to wit:

(*Demurrer to First Plea.*)

23 In the District Court, 2nd Judicial District, Territory of New Mexico, Bernalillo County. May Term, 1884.

WALLACE DOUGLASS
vs.
CHARLES W. LEWIS and JESSIE A. LEWIS.

And the said plaintiff, as to the first additional plea of the defendants by them above pleaded, says that the same and the matters therein contained, in manner and form as the same are above pleaded, are not sufficient in law to bar him, the plaintiff, from having his aforesaid action, and he is not bound by law to answer the same, and this he is ready to verify. Wherefore, for a want of sufficient plea in this behalf, the plaintiff prays judgment, together with damages and costs, as above pleaded in this declaration.

STONE & STONE.
FISKE & WARREN.

And the plaintiff, as to the second additional plea of the defendants by them secondly above pleaded, and whereof they have put themselves upon the country, doth the like.

STONE & STONE.
FISKE & WARREN.

And said plaintiff, as to the pleas of the defendants by them first above pleaded, and whereby they have put themselves upon the country, doth the like.

STONE & STONE,
FISKE & WARREN,
Attorneys for Plaintiff.

At a regular term of the district court of the county of Bernalillo, in the second judicial district of the Territory of New Mexico, begun and held at the court-house in said county, on the 5th day of May, A. D. 1884, the following proceedings, among others,
24 were had on the nineteenth day of said term, it being the 26th day of May, A. D. 1884.

Present, the Honorable Joseph Bell, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial district court thereof.

(*Judgment Sustaining Plaintiff's Demurrer, &c.*)

WALLACE DOUGLASS *vs.* CHARLES W. LEWIS and Wife.

Covenant.

Now comes the plaintiff and demurs to the 1st additional plea of the defendants filed on the 16th of May, 1884, and, issue being joined thereon, the same is tried by the court; whereupon it is ordered and adjudged that said demurrer be, and it is hereby, sustained and that the said plea be held for naught; to which return the defendants, by their counsel, then and there duly except.

And thereupon, issue being duly joined upon the pleas not held bad on demurrer, and both parties being present, by their respective attorneys, then comes a jury, namely, Ramon Gutierres, Felix Romero, Jose Manuel Montoya, Juan Montoya, Roman Garcia y Montaño, Jose Ma. Gutierres, Juan Chaves, Donaciana Aragon, Dario Aragon, W. H. H. Metzger, Nestor Castillo, Lirzo Bazan, twelve good and lawful men, chosen from the body of the county of Bernalillo, who, having been duly sworn the truth to speak upon the issue joined, hear part of the evidence, and, the case not being finished at the adjournment for the day, they are excused until the reopening of the court.

(*Defendants' Motion to Exclude Evidence.*)

WALLACE DOUGLASS, Pl't'ff, *vs.* C. W. LEWIS *et al.*, Def'ts.

Covenant.

25 The defendants Lewis, by their attorneys, Stearns & Douglas and S. M. Barnes, now come and move the court to withdraw and exclude from the consideration of the jury in this case the plat and survey purporting to be from the surveyor general's office of New Mexico and filed with the register of the land office in the Territory of New Mexico and offered and read in evidence by the plaintiff, because said plat and survey is not properly authenticated and certified according to law; secondly, because said plat and survey does not appear to have been based upon any direction or authority of the Secretary of the Interior or register or Commissioner of the Land Office of the United States; thirdly, because the field-

notes referred to in the plat and report of the survey of said land have not been offered and read in evidence to show a basis or authority for said report; fourth, because such plat and report does not in law show or tend to show title in the United States to the land sold and conveyed by defendants to plaintiff and named in plaintiff's suit.

The defendants also move the court to exclude from the consideration of the jury all the evidence or so much of the evidence of Max Frost as relates to said plat and survey and his statement attempting to explain said report or tending to show that the land in contest is public land and the property of the United States, because said testimony of said witness is illegal and incompetent and secondary in its nature and character and no proper foundation was first laid for the introduction of said witness' testimony.

STEARNS & DOUGLAS AND
S. M. BARNES,
Att'ys for Defendants.

Filed May 27, 1884.

EDMUND H. SMITH, *Clerk.*

26 And afterwards, to wit, on the twentieth day of said term, being May 27th, 1884, the following proceedings, among others, were had:

WALLACE DOUGLAS *vs.* CHARLES W. LEWIS *et al.*

Covenant.

The trial of this action proceeds, and not being finished at the hour of adjournment for the day the jury are then excused until the reopening of court.

And afterwards, to wit, on the twenty-second day of said term, being the 29th day of May, the following proceedings, among others, were had:

(*Judgment.*)

WALLACE DOUGLASS
vs.
CHARLES W. LEWIS and JESSIE A. LEWIS.

Covenant.

The jury, having now heard all the evidence, say, by direction of the court, that they find for the said plaintiff in the sum of five thousand three hundred and thirty-three dollars and thirty-three $\frac{1}{3}$ cents ($5,333.33$\frac{1}{3}$); wherefore it is considered by the court that the plaintiff do have and recover of and from the defendants the said sum of $5,333.33$\frac{1}{3}$, together with his costs in this behalf laid out and expended, to be taxed, with execution therefor. Whereupon the defendants give notice of intention to move for a new trial and in arrest of judgment.

And thereafter and on the 31st day of May, 1884, there was filed in the office of the said clerk a motion for a new trial in the words and figures following, to wit:

(*Motion for New Trial.*)

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

27 In the District Court for the Second Judicial District of the Territory of New Mexico, Sitting in and for the County of Bernalillo for the Trial of Causes Arising under the Laws of the Territory, at the May Term, A. D. 1884.

WALLACE DOUGLASS, Plaintiff,

vs.

CHARLES W. LEWIS and His Wife, JESSIE LEWIS, Defendants.

Covenant.

And now come the defendants, Charles W. Lewis and Jessie A Lewis, his wife, by their attorneys, Stearns and Douglas and S. M. Barnes, and move the court to grant them a new trial in this case and set aside the verdict of the jury and judgment rendered herein against them in this action, without the payment of costs, on the following grounds and for the following reasons, to wit:

First. The court erred, to the prejudice of these defendants, upon said trial in permitting the plaintiff to read in evidence the plat and report of the surveyor general of New Mexico and filed in the register's office of the United States within the Territory of New Mexico and produced by Max Frost, register, and in permitting the said Frost to testify in reference to the said plat and report and in reference to the lands in controversy in this case, because said plat and report and the evidence of said Frost was incompetent, irrelevant, and illegal. The court also erred in not sustaining the motion of these defendants, pending said trial, to exclude from the consideration of the court and jury said plat and report and the evidence of said Frost.

Secondly. The court erred in rejecting and excluding from the jury the testimony of defendants' witnesses—Charles W. Lewis, Jesus Baca, Teodoro Lopez, José Lueras, Juan Armijo, and Atanacio

28 Montoya—offered upon said trial to prove possession and title in fee simple and the long continued adverse possession of these defendants and those under whom they claim the land in contest in this case; and the court also erred in rejecting and excluding upon said trial from the consideration of said court and jury all evidence offered by them showing and tending to show that Antonia Sandoval, deceased, held, possessed, and owned the land in contest under a grant and title to said land under the Mexican Government or Spanish Government prior to the "treaty of Guadalupe Hidalgo;" and the court also then and there erred upon said trial in rejecting and excluding from the consideration of said court and jury all the docu-

mentary evidence offered by these defendants and marked as exhibits in this cause showing title and possession in these defendants and those under whom they claim, to wit, the will of Antonio Sandoval, the partition and division of said lands between the devisees of said Sandoval, and the deeds from the heirs of the said Sandoval, and the two powers of attorney authorizing the conveyance of said lands, and the letters of administration of the administrators of the estate of the said Sandoval, and the evidence of the existence of the title papers of the said Sandoval to said lands and the destruction thereof by robbers, and all the evidence offered by these defendants upon said trial to prove title and possession of these defendants and those under whom they claim said lands, all said documentary evidence aforesaid and parol evidence aforesaid being competent and legal in this case to support the title in fee simple of these defendants to said lands.

Thirdly. The court erred in not submitting to the jury upon said trial all said documentary and parol evidence offered by these defendants.

29 Fourth. The court erred in withdrawing the evidence and facts presented by defendants upon said trial from the consideration of the jury and deciding that the matters in controversy were purely questions of law for the court and not questions for the consideration of the jury.

Fifth. The court erred upon the said trial in directing a verdict in this case for the plaintiff against the remonstrance of the defendants in any amount whatever.

Sixth. The court erred upon said trial in directing any verdict or judgment beyond nominal damages against defendant or in directing any verdict whatever in favor of the plaintiff; and the court also erred in refusing to charge at the instance of defendants to find a verdict upon the evidence in favor of these defendants.

Seventh. The court erred in its written charge to the jury to find a verdict for the consideration money or purchase price of said land and in the entire charge in charging or directing any verdict in favor of plaintiff and against these defendants, because there was no such evidence or any evidence of a legal or competent character to authorize or justify the court in said charge or in directing any finding whatever for the plaintiff, and because the plaintiff's declaration in this case and the evidence offered by him in support thereof did not and does not show any cause or ground of action whatever against these defendants in law or in fact or any breach whatever of the pretended implied covenant sued on in this action.

Eighth. The finding of the court and direction of the court upon said trial is against the law and evidence in this case.

Ninth. The finding of the jury is against the law and evidence in this case.

30 Tenth. The amount found by the jury by direction of the court in favor of the plaintiff and against defendants is excessive and against the law and evidence in the case.

Eleventh. The finding of the court and jury should have been in favor of the defendants.

Twelfth. The court admitted upon said trial incompetent and illegal evidence, both oral and documentary, in favor of the plaintiff and against defendants.

Thirteenth. The court refused upon said trial competent and legal evidence, both oral and documentary, offered upon said trial by these defendants.

Fourteenth. The court erred upon said trial in each and every ruling, step, order, direction, charge, and judgment directed and rendered against these defendants.

Fifteenth. The court erred in sustaining plaintiff's demurrer to defendants' special plea of seisin.

Wherefore these defendants ask and move the court to set aside said judgment of the court, verdict, and finding of the jury rendered herein, and to award to these defendants a new trial in this cause without the payment of costs.

STEARNS & DOUGLAS,
S. M. BARNES,
Attorneys for Defendants.

And on the same day there was also filed in the office of the said clerk a motion in arrest of judgment in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting within and for the County of Bernalillo. May Term, A. D. 1884.

31 WALLACE DOUGLASS, Pl't'ff,
vs.
CHARLES W. LEWIS, *et al.*, Def'ts.

Covenant.

And now come the defendants, Charles W. Lewis and his wife, Jessie A. Lewis, by their attorneys, Stearns and Douglas and S. M. Barnes, and move the court to arrest the judgment rendered in this case in favor of the plaintiff and against these defendants and vacate the verdict of the jury rendered in this action for the following reasons, upon the following grounds, to wit:

First. The plaintiff's declaration in this case does not show or set forth any ground or cause of action whatever upon which plaintiff is entitled to recover a judgment or verdict herein.

Secondly. Said declaration does not, upon its face, show or allege that he, plaintiff, has been evicted from the possession of the land in contest or any part thereof, nor does said declaration show that defendants have committed any breach of their covenant or warranty contained in the deed of conveyance to the land in controversy, nor does the declaration show any lawful breach of any covenant of title whatever whereby plaintiff is entitled to recover against these defendants. Said declaration fails to show any damage or injury whatever, and said declaration fails to show any tender back to these

defendants of the lands named in said plaintiff's declaration or any part thereof, nor does said declaration aver or show any reconveyance or offer to reconvey to these defendants the lands in contest.

Wherefore said defendants pray that said judgment herein rendered be arrested and set aside.

STEARNS & DOUGLAS,
S. M. BARNES,
Att'ys for Def'ts.

32 At a regular term of the district court of the county of Bernalillo, in the second judicial district of the Territory of New Mexico, begun and held at the court-house in said county, on the 5th day of May, A. D. 1884, the following proceedings, among others, were had on the twenty-fifth day of said term, it being the 2d day of June, A. D. 1884.

Present, the Honorable Joseph Bell, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial district court thereof.

(*Order Overruling New Trial.*)

WALLACE DOUGLASS *vs.* CHARLES W. LEWIS *et al.*

Covenant.

Now come the defendants and move the court to grant a new trial and to arrest the judgment herein, which motions, after advisement had, are ordered to be, and are hereby, overruled and denied; to which rulings of the court the defendants, by their counsel, then and there duly except; and thereupon it is ordered that an appeal to the supreme court and a supersedeas of the judgment herein pending the same be allowed defendants on filing the requisite affidavit and bond during the present term, with an extension of time till 1st October next in which to prepare and file a bill of exceptions.

And thereupon and on the 2d day of June, 1884, there was filed in the office of the said clerk an affidavit for appeal in the words and figures following, to wit:

(*Affidavit for Appeal.*)

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

In the District Court for the County of Bernalillo, at the May Term, A. D. 1884.

33 WALLACE DOUGLASS, Pl't'ff,
vs.
CHARLES W. LEWIS and JESSIE A. LEWIS, His Wife, Defendants.

Covenant.

Charles W. Lewis and Jessie A. Lewis, his wife, defendants in the

above-entitled cause, tried and determined at the present May term of said court, make affidavit and upon their several oaths say that the above-entitled case has been tried and determined against them at the present May term, A. D. 1884, of said court, and that they desire an appeal from the judgment of said court to the supreme court of the Territory of New Mexico, and therefore they pray an appeal in said case. They further state that said appeal is not taken for the purpose of vexation and delay, but because they, the said affiants, believe that they, appellants, are aggrieved by the judgment and decision of said court rendered against them in the aforesaid action this the 2d day of June, A. D. 1884.

CHARLES W. LEWIS.
JESSIE A. LEWIS.

Sworn and subscribed before the undersigned by the above-named affiants, Charles W. Lewis and Jessie A. Lewis, according to law this 2d day of June, A. D. 1884.

[Seal 2d Dist. Court.]

EDMUND H. SMITH,
Clerk 2d Dist. Court.

And thereafter and on the 3d day of June, 1884, there was filed in the office of the said clerk an appeal bond in the words and figures following, to wit:

(*Appeal Bond.*)

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

34 Know all men by these presents that we, Charles W. Lewis and Jessie A. Lewis, as principals, and Santiago Baca, Manuel Apodaca, and Jesus Apodaca, as sureties, are held and firmly bound unto Wallace Douglass in the sum of eleven thousand dollars; for the payment of which, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators.

Signed with our hands and sealed with our seals and dated this 2d day of June, A. D. 1884.

The condition of the above obligation is such that whereas the above-bounden Charles W. Lewis and Jessie A. Lewis have taken an appeal from the judgment of the district court of the county of Bernalillo to the supreme court of the Territory of New Mexico from the decision of said district court rendered on the 29th day of May, A. D. 1884, thereat, in a case wherein Wallace Douglass was plaintiff and Charles W. Lewis and Jessie A. Lewis were defendants, for five thousand three hundred and thirty-three dollars and thirty-three cents ($5,333.33⅓), together with costs taxed:

Now, if the said Charles W. Lewis and Jessie A. Lewis shall prosecute their said appeal with due diligence to a decision in the said supreme court and, if the judgment appealed from be affirmed or the appeal be dismissed, shall perform the judgment of the district court and pay all costs that may be adjudged against them upon

their appeal, then this obligation to be void; otherwise to remain in full force and effect.

CHARLES W. LEWIS. [SEAL.]
JESSIE A. LEWIS. [SEAL.]
SANTIAGO BACA. [SEAL.]
his
MANUEL † APODACA. [SEAL.]
mark.
his
JESUS † APODACA.
mark.

35 Witness:
SANTIAGO BACA,
THOS. G. DOUGLAS,
As to Manuel Apodaca and Jesus Apodaca.

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

Personally appeared the above-named Santiago Baca, Manuel Apodaca, and Jesus Apodaca, all personally known to me to be the persons they represent themselves to be, and severally acknowledged that they signed, sealed, and executed the foregoing bond as their voluntary act and deed.

Given under my hand and official seal, at Albuquerque, New Mexico, this the third day of June, A. D. 1884.

[NOTARIAL SEAL.] THOS. G. DOUGLAS,
Notary Public, Bernalillo County.

TERRITORY OF NEW MEXICO, *Second Judicial District,* } ss:

Bernalillo District Court.

I, the undersigned, clerk of the second judicial district court of the Territory of New Mexico, do hereby certify that on this second day of June, 1884, personally appeared before me the above-named Charles W. Lewis and Jessie A. Lewis, personally known to me to be the same persons named in and who executed the foregoing bond, and severally acknowledged to me that they executed the same for the purposes therein set forth; whereupon I approved and took the said bond.

[Seal 2d Dist. Court.]

EDMUND H. SMITH, *Clerk.*

36 And thereafter and on the 20th day of October, 1884, there was filed in the office of the said clerk a bill of exceptions in the words and figures following, to wit:

(*Bill of Exceptions.*)

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

Bernalillo District Court. May Term, A. D. 1884.

WALLACE DOUGLASS
vs.
CHARLES W. LEWIS *et al.* } No. 975.

Covenant.

MAY 25, '84.

Messrs. Stone & Stone and H. L. Warren for plaintiff; Messrs. Stearns & Douglas and S. M. Barnes for defendants.

* * * Issue having been joined on plaintiff's demurrer to defendants' plea first herein pleaded, the court sustained said demurrer, to which the defendants at the time duly excepted.

And thereafter, the cause coming on for trial, there comes a jury, and after the due exercise of challenges for cause and peremptorily by both plaintiff and defendants there remained to try this cause the following-named jurors, to wit: Ramon Gutierres, Felize Romero, José Manuel Montoya, Juan Montoya, Roman Garcia y Montana, José Maria Gutierres, Juan Chaves, Donaciano Aragon, Dario Aragon, W. H. H. Metzger, Nestor Castillo, Tierso Bazan.

W. S. Stone opens for the plaintiff.

WALLACE DOUGLASS, being duly sworn, testifies:

STONE: State your name, age, and residence.

My age is fifty-six years, and I live at Las Lagunitas.

Are you the plaintiff in this case?

I am.

Do you know the defendant?

37 I do.

Look at this deed. (Shows witness a paper.) State whether or not the defendant, Charles W. Lewis, and his wife made that deed to you.

They did; yes, sir.

What is the date of that deed?

May 18th, 1882.

(Deed offered in evidence by plaintiff.)

BARNES: Defendant objects, because this action is founded upon what is termed under the statute an implied covenant of warranty, and there is no remedy known to the law in this country whereby they can maintain an action on this deed, and if any action can be maintained on this deed it must be on the implied warranty.

Overruled, and the defendant then and there excepts.

STONE: Deed marked Plaintiff's Exhibit "A;" what is the consideration expressed in that deed? And state whether or not that is the actual consideration or not.

It is five thousand (5,000) dollars.

Defendants object to this testimony as incompetent.
Overruled, and the defendants then and there except.

Do you know what is the interest on that since it was executed?
I have not made any calculation?

WALLACE DOUGLASS, direct continued:

STONE: (Shows witness a little map.) Examine that map and state whether it is a correct map of the land described in this deed.
It is, I think, a correct map.
State in what sections and in what township that land is situated.
It is sections 5 and 6, township 9 north, of range 3 east.

38 (Map offered in evidence by plaintiff.)
Defendants object as incompetent and irrelevant, but the court overruled the objection, to which the defendants then and there duly except.
Marked Plaintiff's Exhibit "B."

Cross-examination:

BARNES: You say you are the plaintiff in this case?
Yes, sir.
Are you now in possession of the land in dispute in this case?
Yes, sir; I am living on it.
You have been living on it ever since the time of your purchase of it from Mr. Lewis?
Yes, sir.
You have never been disturbed in the possession of it?

Plaintiff objects to the question, which the court sustains, and the defendant duly except.

Did you receive the possession—the peaceable possession—of that land from the defendant, Charles W. Lewis, at the date of your purchase?

Objects. Overruled, to which the plaintiff excepts.

A. I did.
Was not Mr. Lewis in possession of that land before you purchased it from him?

Plaintiff objects. Sustained, and defendant excepts.

Redirect examination:

STONE: Have you ever made any demand on Mr. Lewis for your money?
I don't know that I understand you.
Did you notify Mr. Lewis of his failure to make conveyance to you, as specified in that deed, and did you make a demand for the money?

39 Object, as the declaration will show.
(Question withdrawn.)

MAX FROST, being duly sworn, testifies:

STONE: What is your business?
I am register of the U. S. land office at Santa Fé, this Territory.
Have you a map with you of town. 9 north, range 3 east?
Yes, sir.

(Shows Exhibit "B" to witness.)
Identify on your official map the same land that was identified by the witness Douglass.

A. This plat shows.

Object.

COURT: State what that is; who got it up?
A. This Exhibit "B" is a plat of sections 5 and 6, town. 9 north, of range 3 east; made by Richard Paulson, civil engineer, Albuquerque, N. M.
COURT: Can you identify that land shown on that map, Exhibit B, as sections 5 and 6 with the land on your official map?

Object. Overruled, but witness does not answer.

What is that map you have in your hand?
This is an official map of town. 9 north and range 3 east, and it is on file in my office, in Santa Fé—the plat of land on this map made by Paulson to the S. E. ¼ of the N. E. ¼; also with a portion of the N. E. ¼ of the S. E. ¼ of section 6. It would also correspond with the S. ½ of the N. W. ¼ of section 5, with a part of the N. ½ of the S. W. ¼ of section 5, and with a portion of the S. W. ¼ of the N. E. ¼ and the N. W. ¼ of the S. E. ¼ of section 5, all in town. 9 north, of range 3 east, of the United States survey of the Territory of New Mexico.

40 Defendant objects to this answer as incompetent.
Overruled, to which defendant then and there duly excepted.

State to whom that land that appears on your official map belongs.

Object, because map is not before jury.
(Map offered in evidence by plaintiff.)
Defendant objects, because the field-notes are not here, if it is competent for any purpose, &c.
Overruled, and the map is admitted in evidence for the present, but the court reserves the question as to its force and effect.
Defendant then and there excepts to the ruling of the court in admitting the map for any purpose, as it is incompetent evidence, which was overruled, and defendant then and there duly excepted.
(A tracing of it is to be made and certified by Mr. Frost and to be considered same as the original.)

State whether or not that map shows to whom the land in sections five and six belongs.

Object, to which defendant then and there excepted as incompetent.

COURT: The question is whether this map is *prima facie* evidence of title to the land. I will allow the *locus* to be identified, if this official can testify to it, for the purpose of getting on with the trial at this time, subject to be hereafter stricken out if it can be shown that it is not admissible.

To which defendant excepts, because it is incompetent and because this witness is incompetent to prove it.

The portions of sections you describe, to whom do they belong?

41 This map shows that the S. E. ¼ of the N. E. ¼ is included in "timber culture entry" No. 54. The rest of section six, with the exception of this tract included in this entry No. 54, is shown to be public land and open to entry. As far as section five is concerned the map shows it to be vacant.

COURT: There is no entry on it.

No, sir; no entry. The title is in the United States; it is included in the grant of the United States to the Atlantic and Pacific Railroad Company, and is not open to settlement unless title can be proved prior to March 12th, 1872. That means possession and improvement by legally qualified persons prior to March 12th, 1872, the date of the approval of the definite location of the Atlantic and Pacific Railroad.

WARREN: What was the date of that grant?

It was in 1866, but the act did not take effect until after the line was permanently located.

STONE: On May 13, 1882, in whom was the title as appears by the official record—that is, the date of this deed?

To which defendant then objected. Objection overruled, and defendant then and there duly excepts.

A. At that date this township plat was suspended and no entries were allowed thereon pending the adjudication of the grant to the town of Albuquerque to the inhabitants of the town.

Suspended by whom?

By the Commissioner of the General Land Office.

Was or was not the title in the U. S., as appears by that record?

Defendant then and there excepts to said evidence because illegal. Objection overruled.

A. The legal title was in the United States, in my opinion, pending this investigation.

42 As appears from the official record of the United States, in whom was the title?

I should say the legal title was in the United States.

Object to his opinion. Sustained.

State what the official record shows in reference to the title on the 13th May, 1882.

Defendant objects because record will show.

COURT: He can explain the remarks on the map.

Defendant then and there excepts.

A. The plat shows that this survey was made on the 22nd day of April to the 27th of April, 1881, by Warner and Cunningham, U. S. deputy surveyors; that it was filed in the office of the register at Santa Fé on the first day of August, 1881; that by telegram from the Commissioner of the General Land Office——

Object. Sustained.

COURT: The question is what that official map shows, if anything, in regard to the title of the land on the 13th May, 1882?

A. That it was public land of the United States.

State from whom you received that official map.

It was received from the surveyor general of the U. S. for the Territory of New Mexico.

When?

On the first day of August, 1881.

State if that map is on file in your office at present.

COURT: He has stated that.

A. Yes, sir.

Cross-examination:

BARNES: Have you ever been upon this land or do you know anything about it, personally?

I have ridden over it, but not in any official capacity, eight years ago.

43 Were you present at any survey of this land in any way?

No, sir.

Point out on the map here to the jury the land that is embraced in the deed, or can you from the call or lines in this deed identify it on the map described as follows?

(Barnes reads from deed:)

"On the north by the lands of Chas. Garcia (?); on the south by lands of Charles W. Lewis; on the east by the sand hills; on the west by the Rio Grande, being 4,711 feet from east to west and 1,490 feet from north to south."

Now, can you tell from your map, comparing it with the calls as I have read them from this deed, where the land is?

A. No, sir.

Can you undertake to tell this jury that, from the calls in this deed, you know that any yart of it is public land, according to this——

Object. Sustained.

Point out to the jury, according to this map, this official map, the land you testified about from the other map made by Paulson.

A. As near as I can do it, this map being upon a larger scale, I will point it out. (Shows map to jury.) This red line here describes it as near as it can be described on this official map.

You were not present at the making of that survey and know nothing about how it was done?

No, sir.

Were you present at the survey of the entry represented here on it?

No, sir.

The field-notes referred to here on this map are not here, are they?

44 No, sir.

Are they in existence?

I don't know.

Have you any knowledge of their destruction?

No, sir.

You were not present when any of these lines were run?

No, sir.

Does this official map embrace all the land in controversy here, according to that map?

No, sir.

How much of it does it take in?

Without any mathematical calculation, I should estimate it at about fifty acres.

That is all?

Yes, sir; fifty acres of this land is within the boundary of this "entry" that I spoke of.

How much of this 160 acres that you spoke of is represented on this map?

I have traced a line on this map, embracing the blue map, to make it correspond. There is about fifty acres of this tract on the blue map that is embraced in the "timber culture entry" No. 54.

This map does not show who, if any person, has entered it?

This map shows that no one has entered the remaining portion.

Do you know who did enter that fifty acres?

Object because the entry is the best evidence.

(Question withdrawn.)

Have you got a copy of the entry?

No, sir.

Don't you know that, as matter of fact, Mr. Douglass entered it?

Objected and excluded.

45 Can you take official map and identify this land in controversy on it or any part of it?

No, sir; not from the boundaries of the deed, I could not.

Without the aid of the Paulson map you could not identify or locate it at all?

No, sir.

Can you take the official map and compare it with the calls in the deed here and identify it?

No, sir.

The only way that you are enabled to identify it at all, notwithstanding the official map, is by the blue map made by Paulson?

Yes, sir; that is the only way.

WALLACE DOUGLASS, recalled, testifies (by permission):

STONE: Look at this original deed; trace the lines on that map called for in the original deed, and see if the map covers the property described in the deed.

Obj. because he has already testified to that.

COURT: You may say whether the map corresponds with the description in the deed.

It does; yes, sir.

STONE: Is that the property you showed Mr. Hill, the engineer, and had him run the lines of?

Object. Overruled.

Yes, sir; it is.

The land surveyed by Mr. Hill is the same as that marked on that map, and the same that you purchased from Mr. Lewis?

Object. Overruled, and defendants then and there duly except.

Cross-examination:

46 BARNES: Are you a surveyor?

No, sir.

Know nothing at all about the principles of surveying?

No, sir.

You cannot tell, not having any practical knowledge of surveying, whether a survey is made correct or not, can you?

Obj. as not cross-examination.

I think it was correct.

Obj. to what he thinks. Sustained.

That is a mere opinion. I want your knowledge.

No; I could not be certain that it was absolutely correct.

Now, at the time Mr. Hill made the survey was Mr. Lewis there, or did he have any notice of it?

Not that I know of.

Don't you know that he was not present?

Obj. as immaterial. Sustained.

WILLIAM F. HILL, being sworn, testified:

STONE: Where do you reside?

I live in Albuquerque.

What is your occupation?

I am a surveyor and civil engineer.

(Shows witness deed.)

Do you know a piece of land down the river described in the deed that you have in your hands? I will first ask you if you run any lines on a piece of land pointed out by Mr. Douglass at his request?

Yes, sir; I did.

Obj. as incompetent. Overruled.

State if that map, the blue map, "Exhibit B," contains a correct survey and location of that land.

Obj't. Overruled.

47 Yes, sir; I investigated it right here. I looked over it and consider it correct. I think the land is located right where it is represented on this map.

Are the lines marked there correctly?

I think so. Yes, sir; I measured it, and I think they are correct.

State what sections and townships that land is situated in.

It lies, as it is shown here, in range 3 east, town. 9 north, part in section 6 and part in section 5.

What county and Territory?

In the county of Bernalillo and Territory of New Mexico.

Cross-examination:

BARNES: Do you know anything about the boundaries of the land contained in that deed of your own knowledge?

I have not read from the deed.

Did you ever make any survey of that land yourself?

Yes, sir.

Did you have that deed before you and the boundaries contained in it when you made that survey?

No, sir.

You only had your plat; you did not have the deed at all?

No, sir.

Had you ever been upon the land at any time in your life before?

Yes, sir.

Did you know anything of the lines or corners or distances?

No, sir; I know when the lines were run and have seen the corners before.

What corners?

48 Those quarter-section corners between 5 and 6.

Did you know but one corner?

I knew several.

Did you see those corners made yourself?

My knowledge is in connection with railroad work that I did.

Were you present when Paulson made his survey as represented on that blue map?

No, sir.

Then so far as Paulson's survey is concerned, of your own knowledge, you know nothing of its correctness?

I retraced his lines.

On the map or on the ground?

On the ground.

Was Mr. Lewis present?

Obj. Sustained.

What do you mean by retraced?

I retraced them with an instrument and chain.

State how they corresponded with lines on the map.

I think the lines are just as they are represented on this map, to the best of my knowledge.

(SUNDAY, *May* 27, 1884.)

(A tracing of the original plat (offered) has been made since last evening and is now, by consent of counsel, allowed to be considered in place of the original. Allowed in evidence and marked Plaintiff's Exhibit "C.")

Plaintiff now offers in evidence the act of Congress granting land to the Atlantic & Pacific R. R.

Court allows it if it is necessary.

Plaintiff's case.

Defence.

BARNES: Defendants, by counsel, now move the court to
49 take from the consideration of the jury the plat, Plaintiff's "Exhibit C," purporting to be from the office of the surveyor general, because it is not properly authenticated and because the field-notes from which it is made have not been offered in evidence to show the basis or authority for such a plat; and the defendant, by consent, also moves the court to exclude from the consideration of the jury all the evidence or so much of the evidence of Max Frost as relates to said survey and his statement tending to explain said plat and such of his testimony as tends to show that it is public land.

(See motions on file herein.)

Court holds that the affirmative in this case is with the defendant, and he only allowed plaintiff to put in his case first because the register of the U. S. land office is here and wanted to leave; to which ruling—that the affirmative is with the defendant—the defendants, by counsel, then and there except.

(Barnes makes opening statement to jury.)

CHARLES W. LEWIS, sworn, testifies:

BARNES: State your residence.

Albuquerque, New Mexico.

Are you the defendant in this case?

Yes, sir.

Are you acquainted with the plaintiff, Wallace Douglass?

I know him personally.

How long have you known him?

Between two and three years.

(Deed, Plaintiff's Exhibit "A," shown witness.)

Take this copy of the deed. (It is to be considered as the original for the present.) Does that deed bear its true date?

Yes, sir.

50 What was the real consideration paid by the plaintiff to you for the land in question?

$5,330.00.

Did you put the plaintiff in possession of that land at the date of the sale?

Yes, sir.

Was the plaintiff present at that survey?

Yes, sir.

Obj. as irrelevant. Overruled.

Yes, sir; he was.

Does the deed recite truly the boundaries of the land that you sold him and conveyed to him?

Yes, sir.

COURT: It is not competent.

Were you in possession of this land at the time and before the sale to the plaintiff?

Obj. as irrelevant. Overruled.

I was.

Plaintiff excepts to the ruling.

BARNES: How long have you been in possession of this land?

Obj. Overruled, and plaintiff excepts.

Since 1879.

What character of possession did you have there?

Obj. as immaterial. Overruled, and plaintiff excepts.

(No answer.)

I will ask you whether or not the land sold by you to the plaintiff was previously purchased by you or carved out of land previously purchased by you.

Obj. as leading and immaterial. Sustained.

Who did you purchase that land from and obtain the possession from?

From the heirs of Antonio Sandoval.

Obj. by plaintiff, as the deed will be the best evidence. Overruled, and plaintiff excepts.

51 Were they in actual possession of that land, claiming it and holding it as their own, when you purchased it and obtained possession of it?

Obj. by plaintiff, and court excludes the question; to which defendants except.

(Shows witness deeds.)

State what they are.

To court: This is a power of attorney from one of the heirs of the estate of Antonio Sandoval. The date is July, 1879, on the power of attorney. This paper is a deed from Jésus Baca for a portion of the lands embraced in the sale to the plaintiff, Mr. Douglass. I have a deed from Guadalupe Guitiérres, one of the heirs of Antonio Sandoval, conveying some of this land to me.

COURT: Does that deed cover the land in question?
A portion of it. It is dated July, 1879.

Defendant thereupon, by counsel, offered the power of attorney and the deed in evidence.

Plaintiff objects to the introduction, because it is totally incompetent for the purpose for which it is offered.

Memorandum.—Argument and numerous authorities cited. (The force and effect to be given to official plat.)

Plaintiff also objects to the introduction of the power of attorney, because it is not acknowledged under seal, as the law requires, and does not purport to be acknowledged as the act of the grantor at all.

Court examines the power of attorney and sustains the objection and excludes both the power of attorney and the deed executed under it; to which ruling the defendant, by counsel, then and there duly excepts.

Deed marked Defendants' Exhibit 1, 5, 27, '84.

Power of attorney marked Defendants' Exhibit 2, 5, 27, '84.

Plaintiff also objects to the introduction of the power of
52 attorney, because it is from the wife to the husband.

COURT: It is immaterial.

BARNES—

(Shows papers to witness.)

To court: It is a deed for a portion of the land in question.

To witness: What is that paper?

It is a deed from Jesus Baca and Candelaria Aragon, his wife, for a portion of the land—400 yards.

COURT: That is a part of the land in question?

Yes, sir.

(Deed offered in evidence by defendant.)

COURT: Do you know, Mr. Lewis, about what proportion of the land conveyed is described in this deed?

Nearly all of it is in the last. There is only twenty-five or fifty yards in this deed, and the balance is in the other deed.

Plaintiff objects to the introduction of the deed in evidence as irrelevant, and defendant must commence at the source of his title.

Memorandum.—Monday, May 28. Judge Bell sick and no open session.

THURSDAY, *May* 29, '84.

C. W. L. continued:

(Deed shown witness.)

What is the date of that deed?

January 23d, 1882.

From whom to whom is it?

From Jesus Baca and Candelaria Aragon to Charles W. Lewis.

Is that for a portion of the land in controversy here?

Yes, sir.

Plaintiff objects.

(No ruling.)

(Defendant offers the deed in evidence.)

53 Plaintiff objects on the same general ground as stated at last sitting of this court, that it is commencing at the wrong end of their case, unless the defendant avows his intention to connect this with some source of title from sovereignty or some source from which he obtained title in fee simple.

(Deed allowed to go to the jury for the present, and if not connected it is of no value standing by itself.)

Defendant claims the right to commence at either end of his title.

Marked Defendants' Exhibit "Y," 5, 29, '84.

BARNES: (Shows witness another paper.) Tell the court what that paper is.

A deed from one of the heirs of Antonio Sandoval to Charles W. Lewis. It is a deed by power of attorney from Guadalupe Gutierres to me for a portion of that land.

Is that the original deed?

Yes, sir.

Was that paper executed in your presence to you by the party?

Yes, sir.

(Defendant offers the deed in evidence.)

(No ruling now.)

Look at this power of attorney, Mr. Lewis.

Yes, sir; this is a power of attorney.

What is the date of that power of attorney and from whom to whom is it?

It is the same date as the deed.

From whom to whom is it?

To Guadalupe Gutierres, authorizing him to sell this land.

What is the date of it?

This dated the 19th February, 1880.

February or January?

54 It is February they have got it here.

(Defendant offers the power of attorney in evidence.)

Plaintiff objects, because it is not under seal, and because it is not acknowledged, and because a justice of the peace in Mora county could not take acknowledgments affecting real estate, or, rather, could not acknowledge a power of attorney affecting real estate in Bernalillo county.

Sustained, and the power of attorney excluded; to which ruling the defendant, by counsel, duly excepts.

The power of attorney is marked Defendants' Exhibit "Z."

And another deed marked Defendants' Exhibit "X."

How long had you been in possession of the land you sold to Mr. Douglass, the plaintiff, before you sold it to him?

Obj., because there is no such thing as title by adverse possession in this Territory.

(Argument *pro* and *con.*)

Memorandum.—Strong arguments *pro* and *con* re. title of U. S. to all land in N. M. not segregated therefrom in the manner prescribed by Congress; court holds the affirmative, that the title is in the U. S., and Barnes, defendant's attorney, then and there duly excepts.

Court calls attention of counsel to "Edmunds bill," pending in Congress, re. N. M. land titles, in which the Government recognizes the difficulty under which defendant is laboring, and is endeavoring to remedy it.

Defendant claims good title under the Mexican Government before the cession of N. M. to U. S.

COURT: It would not make any difference, under the view of the law taken by the court and the act of Congress, if the actual Spanish grant to defendant's ancestor was here in court. If the same had
55 not been approved by the surveyor general in accordance with the act of Congress this court could not hold it to be evidence as against the U. S. until the land had been released in the manner prescribed by Congress.

BARNES: Defendant proposes to prove by this witness that at the date of the sale and making of the deed to the plaintiff in this case and date at the time he put him in possession that he, Lewis, was in actual and adverse possession of this land.

COURT: You have already proved by Mr. Lewis that he was in possession, and I may as well state now that I do not consider that there is any question in this case for the jury, unless I change my view. You can go on, however, and make the record, and if I deem it proper I will have it read to the jury hereafter.

BARNES: From whom did you purchase the land that you sold and from whom did you obtain possession?

Obj. Overruled, and plaintiffs excepts.

(No answer.)

How long did you have actual and continued and adverse possession of that land before the sale and before you delivered possession to the plaintiff?

Obj. as calling for opinion on matter of law. Sustained.

How long did you have the actual possession of this land?
From the time I bought it until I sold.

Obj. Overruled, and plaintiff excepts.

A. I bought it in 1879, and had it until I sold it.

How long had the persons from whom you purchased it have possession of this land—claiming it as their own?

Plaintiff objects as irrelevant and immaterial. Overruled.

COURT: So far as is within his personal knowledge.

And plaintiff excepts.

56 How long did the persons from whom you purchased have possession of that land, of your own personal knowledge?

I have known the land since 1861.

Obj. by plaintiff. Overruled, and he then and there duly excepts.

Who was in possession of that land in 1861, when you first knew it?

Don Antonio Sandoval.

Obj. by plaintiff. Overruled, and plaintiff then and there duly excepts.

Is he dead or alive?

He was alive at that time.

Is he dead now?

Yes, sir.

About what time, if your recollection serves you, did he die?

I think in 1862.

Who was in possession of that land from the time of his death down to the time you purchased and obtained possession of it?

His heirs.

You purchased from them?

Yes, sir.

Obj. Overruled, and plaintiff then and there duly excepts.

Has any other person except Antonio Sandoval and his heirs and yourself, down to the possession of the plaintiff, been in possession of it or asserting title, so far as you know?

Plaintiff objects to the question. Overruled, and he then and there duly excepts.

(No answer.)

Did you put Mr. Douglass into peaceable possession of this land at the time of the sale?

57 Obj. as calling for an opinion, etc. Sustained, and question excluded.

(Witness answers: Yes, sir.)

Is he in possession now, and has he been in possession—peaceable possession—since you sold to him?

Obj. Excluded.

(Witness answers: Yes, sir.)

Defendant says he offers this testimony, as it may mitigate damages, etc.

BARNES (shows another paper to witness): State to the court what that paper is.

It is a copy of the original will of Antonio Sandoval.

Defendant offers it in evidence.

Plaintiff objects to it as being incompetent to show title in these parties.

Sustained, and defendant then and there duly excepted.
Marked for identification "Defendants' Ex. W., 5–29, 1884."

Barnes shows witness another paper.
It is a "seguella" given by the administrators of the estate of Antonio Sandoval to each of the heirs, showing the division of the estate and the portion of each particular devisee.

Defendants offer it in evidence, but, plaintiffs objecting, the court excluded the same; to which ruling the defendants duly excepted.
Marked "Defendants' Ex. V, 5–29, 1884."

Barnes (shows V to witness): State whether the administrators marked on that "seguella" are all dead.
They are all dead.
Did that paper come to you at the time of the purchase—the time you obtained possession of this land?
Yes, sir.
58 And you held it as a muniment of title since that time?
Yes, sir.

Jesus Baca, being sworn, testifies:

Barnes: Where do you reside?
I reside at Barelas, in this county.
What is your age?
Fifty-seven years.
Have you lived at that place and in this county all your life?
I have.
Did you know Antonio Sandoval in his lifetime?
Yes, sir; I did.
Is he living or dead?
He is dead.
When did he die?
In 1862.
Where did he die?
At Los Barelas.
How long had you known him before his death?
From the time that I was old enough to use reason to the time that he died.
You knew him, then, as much as fifty years ago?
Yes, sir.
Where did he then live?
At Barelas.
Did he continue to live at that place from the time that you first knew him until the time of his death, in 1862?
Yes, sir.
Are you acquainted with the land in controversy in this case, sold by Charles W. Lewis to Mr. Douglass?
Yes, sir.
How long have you known it?

I have known it ever since I was old enough to know
59 anything, as I have resided at Barelas.
Who had possession of that land and claiming it at the time you first knew it?

Obj. Sustained, and the defendant then and there duly excepted. (Answer, not to jury.)

Don Antonio Sandoval was in possession of it.
Was he cultivating it and claiming it as his own?
Yes, sir.
Did he continue to cultivate it and claim it as his own and hold possession of it down to the time of his death?
Yes, sir; he did.
I will ask you if he did not have possession of and claim and hold that with a large amount of adjacent land when you first knew him.

COURT: How is that by any possibility material?
(No answer from counsel.)

Did he have ditches upon this land and cultivate it?
Yes, sir.
Since his death, who has held possession of that land down to the time Lewis took possession of it?
The heirs of Antonio Sandoval.
Do you know them?
Yes, sir.
Tell the court their names.
There are five heirs. There was José Sandoval, Manuela Sandoval, Juan Sandoval, Catherina Sandoval, and Guadalupe Sandoval.
You knew them all?
I did.
Are they the persons named and referred to in this will?

COURT: The will shows.

They were devisees under the will?
Yes, sir.
60 Do you know anything about who were the administrators of his estate?
I do; yes, sir.
Who were they?
Serafino Ramirez, José Gallegos, and Tomas C. de Baca.
Did they act as administrators under his will?
They did.
State whether they partitioned and divided the estate between the heirs.
Yes, sir.
Did you marry one of the heirs of the deceased?
Yes, sir; I did.
Which one?
Candalaria Aragon.

Is that your name on the defendant's Exhibit "Y?"

Yes, sir.

Does that deed cover and embrace a portion of the land devised in his will to his heirs?

Yes, sir.

Did you and your wife take possession of this land under that division?

Yes, sir.

How long did you have possession of it?

Since 1863; the direct heir being the mother of my wife and having died in my house.

Is Candalaria Aragon the child of one of the direct heirs of Antonio Sandoval?

Yes, sir.

COURT: The only child?

Her mother had two children.

COURT: Did she leave a will?

Yes, sir.

COURT: How did she will this property?

61 He willed his property to his two daughters. Candelaria Aragon, my wife, is the grandchild of Juana Sandoval, one of the heirs of Antonio Sandoval, being the daughter of Juan Antonio Aragon, the son of Juana Sandoval. Juan Antonio Aragon had two daughters, and left a will. One of those daughters is my wife and her name is Candelaria Aragon, and the other is Josefa Aragon.

What has become of Josefa Aragon?

She is alive.

Did she make any division of this property?

Obj. as being matter of record. Sustained, and defendant then and there duly excepts.

Did she devise all her part of the estate to you?

COURT: Unless you have a deed——

Defendant excepts.

Did Josefa Aragon devise all her part of that estate to you or did she have any interest in this land?

Josefa Aragon had no interest in the land in controversy in this case; her land is still down there in her right.

COURT: That is immaterial.

The land that you and your wife conveyed by this deed to Charles W. Lewis, was that her separate property?

Obj. Sustained and question excluded; to which defendant then and there duly excepts.

How long had you been in possession of this land before you sold it to Lewis?

I had the ownership and possession of this land from the time

that Antonio Sandoval died up to the time that my mother and father-in-law died. I kept both of them in my house until they died.

When did they die?

In 1866.

62 And after that time down to the sale and conveyance to Lewis you had the absolute possession, did you?

Yes, sir.

Did any person after the death of Sandoval down to the sale and delivery of possession to Lewis even claim it in opposition to your claim in any way, or dispute your title?

Excluded, and defendant then and there excepts.

(Ans. No one.)

Do you know under what claim of title Antonio Sandoval in his lifetime claimed that land—the land in controversy—and other land adjacent to it?

I do.

State it.

Under a title from the Mexican Government.

Did he so claim to have the title from the Mexican Government whilst he lived upon the land and up to the time of his death?

Yes, sir; he did.

Did you ever see his title papers in the lifetime of Antonio Sandoval?

I saw titles various times at the house of Antonio Sandoval; yes, sir.

Of the lands in controversy here?

Titles belonging to the land in question.

COURT: Did you ever read them?

I did not read them all, but he often showed them to us, saying that those were the title to this land.

"That is all excluded;" to which ruling the defendant, by counsel, then and there duly excepts.

Do you know what became of these paper titles?

I do; yes, sir.

What?

They were burned during a robbery committed on the house by thieves.

How long before his death?

63 It was, more or less, in 1858 or '9.

Was Antonio Sandoval a Mexican citizen?

Yes, sir.

Were you old enough to remember the time of the war between the U. S. and Mexico, in 1846?

Yes, sir.

Was he a citizen of Mexico at the time of that war?

He was; yes, sir.

Did he continue to be a citizen of Mexico at the time of 1848 until the ratification of the treaty?

Yes, sir.

Did he continue to live here, in the Territory of New Mexico, and upon these lands until the time he died?

Yes, sir; he did.

He lived all the time at the one place, did he?

He did.

Did he state whilst he lived for how long he had owned that land from titles under the Mexican Government?

I don't remember that we ever had a conversation with him as to when he obtained the titles, but when I was old enough to know anything I know that he had those titles.

Did you know of any opposing title or claim set up to these lands by any person except Sandoval and his heirs and Lewis at any time?

No other person.

TEODORO LOPEZ, being duly sworn, testifies:

BARNES: What is your age?

I am about sixty-seven or sixty-eight years of age.

Where do you live?

At Los Barelas.

How long have you lived there?

Since I was born.

64 Do you know the land in controversy in this case between Mr. Douglass and Mr. Lewis?

Yes, sir.

How long have you known it?

I have known this land since I was born.

Who was in possession of this land when you first knew it?

Antonio Sandoval.

How long did Antonio Sandoval continue in possession of this land from the time you first knew it?

I don't remember how long.

Did he continue in possession of these lands from the time you first knew them down to the time of his death?

He had the possession of them until he died.

Do you recollect when he died?

He died in 1862.

Where did he die?

At his house.

Where was his house?

At Los Barelas.

Close to these controverted lands?

The house is at the center of the possession of lands that he had—the grant of lands that he had.

Did he cultivate these lands or have them cultivated?

Yes, sir.

Were you ever in his employ?

I was mayor domo in the house of Sandoval for thirty years.

Were you overseer of these lands in controversy during that time, together with other lands of Antonio Sandoval?

I was overseer of these as well as other lands and of his

65 men that he had to work for him for over thirty years.

During that time did you cultivate those lands as mayor domo under him?

We cultivated that by giving it on shares to others, and I was overseer over it all.

During all that time?

Yes, sir.

Was there any dispute of his title to these lands during those thirty years?

No, sir.

Since his death who has had possession of those lands?

The heirs of Antonio Sandoval.

Do you know that?

Yes, sir.

Do you know anything about the papers being burned in any way—the titles to these lands?

I do.

State all you know about that.

They tied me up and tried to burn me up with the papers. The thieves tied me up.

What papers?

All the most valuable papers of Don Antonio Sandoval.

COURT: Did you ever read those papers?

I don't know how to read. I did not.

BARNES: Did Antonio Sandoval state at that time what papers these were?

(Excluded. Allowed to answer.)

Yes, sir; he did. He kept them in the room where he stayed himself.

What papers did he state they were?

They burned papers from the King of Spain and they burned notes and other documents that he had of debts owed to him from different people.

66 Did he speak of burning titles to these lands in controversy?

He did say they had burned his titles to most of that—right then in the room when I was with him.

What time did the burning occur?

I don't know what the date of it was.

How long was it before his death?

Four or five or six years, at the most, before his death; I am not sure.

COURT: All this is excluded from the consideration of the jury; to which the defendants, by counsel, then and there duly except.

(*Afternoon Session*, 5, 29, '84.)

JOSÉ LUEROS, sworn, testifies:

Where do you reside?

At Los Barelas.

How long have you lived there?
Since 1839.
What is your age?
Sixty-six years.
Have you been well acquainted in that locality and in that vicinity until now?
Yes, sir.
Do you know the land in controversy in this case?

COURT: If this is merely cumulative what advantage is there in swelling the record?

BARNES: It is not entirely cumulative.

Who was in possession of this land when you first knew it?
Don Antonio Sandoval.
He cultivated it and claimed it as his own during that time?
He did.
Did you know him well in his lifetime?
67 Yes, sir; I lived there with him all the time.
Did anybody else ever claim or have any possession of these lands, except Antonio Sandoval and his heirs and Lewis here, that you know of?
No, sir.
Anybody set up any claim to it in any way?
None to my knowledge.
Were you ever in the employment of Antonio Sandoval in his lifetime?
Yes, sir; I was.
In what capacity?
I was agent for the purpose of trading between here and the Republic of Mexico.
Was he a Mexican citizen when you first knew him?
Yes, sir.
Did he continue to be a Mexican citizen to the time of the treaty between Mexico and this Government?

COURT: That is cumulative.

Did you act as agent and clerk, for how long a time?
I always lived at his house, and three consecutive years I went to Durango for the purpose of trading in sheep.
What time was that?
In 40, '1, and '2.
Under what title did he claim to own and hold that land?
He claimed it under different titles. I saw one of 1809 and '15, 1807 and '9, and many titles of different years under which he claimed.
Under what government did he claim title?
Under the government of Mexico.
Did he claim to have title by paper or deed, or in what manner?
He had different titles by purchase.

68 Did you ever see any of his titles or grants to lands—to this land—whilst he was in possession of it?

I did.

What were they?

The titles that I saw while he was in possession of this land were conveyances by other citizens to him of this land dated previous to my birthday.

Did you ever see any title direct from the Mexican Government to these lands?

No, sir.

Did you ever read any of those titles?

I did read the titles.

Did they cover and include this land in controversy?

They did; yes, sir.

Now, what has become of these title papers, if you know?

I do know.

What became of them?

They were burned.

At what period of time?

I don't remember the date exactly, but it was three or four years after the occupation by the American Government of this Territory.

Where were they burned?

In the same room where he resided.

What were the circumstances of that burning? State all you know about it.

There were some Americans belonging to the United States band of music that was stationed here at that time; they went down to his house. They did not find Sandoval there at the time; they found his mayor domo. They assaulted the house and broke into the bureau and took some silver coin and took all the valuable things that were in that bureau and tied up the mayor domo and set fire to the papers and tried to burn the mayor domo also.

69 Who was the mayor domo?

Tedoro Lopez.

Is he the man that testified here this morning?

Yes, sir.

Did you see that occurrence?

I was not there when it actually happened. I saw everything next day.

What signs did you see next day?

I saw that the bureau was broken and that they extracted what it contained, and I saw the remains of land papers burned up and a lot of common jewelry.

Where was Antonio Sandoval at the time this burning took place, if you know?

He was at the town of Alameda, up the river here.

And he continued in the possession of that land from that time up to the time of his death, claiming it under those titles?

He did; yes, sir.

Did you see Lewis put in possession of that land?

Court interferes and stops counsel, as this is already in evidence, and this is now excluded from jury; to which the defendants, by counsel, then and there duly except.

JUAN ARMIJO, being duly sworn, testifies:

Defendant offers to prove by this witness that his age is sixty-five years, and that he knew Sandoval for sixty years—sixty years ago; that Sandoval was in possession of this land, claiming it and holding it and using it as his own, and that this witness bought lands from Antonio Sandoval, etc., all of which is excluded; to which ruling of the court the defendants, by counsel, then and there duly except.

That the witness tried to buy these lands in 1846 whilst
70 Sandoval was in possession, and that Sandoval's devisees took possession of these lands, &c.; that there was a partition and division.

Excluded, and defendants then and there duly except.

And that all the heirs of Sandoval, since the making of this partition, have acquiesced in the same and never disputed the validity of it.

Excluded; to all of which the defendants then and there duly except.

ANTONACIO MONTOYA, being duly sworn, testifies:

What is your age?

I was born in 1823.

Where were you born?

At Los Ranchos de Albuquerque.

Where have you lived all your life?

I lived at Ranchos de Albuquerque when I was and until I was about five years of age, and afterwards at Los Candelarias.

Are you acquainted with the land in controversy here?

Yes, sir.

How long have you known it?

I know this land ever since 1834.

COURT: Is this cumulative?

BARNES: Defendant proposes to prove by this witness that he has known the land and lived near it since 1834, and that in 1834 Sandoval was in possession of it and continued to hold possession of it down to the time of his death, in 1862, and that during all that time no one undertook to dispute his title, and possession was kept up down to the time of the delivery of possession to the plaintiff.

COURT: You have all that in proof——

And we propose to prove by this witness that he was at the
71 house of Sandoval, and while at the house it was robbed and his papers were burned, and he saw the remains after the burning.

All excluded by the court; to which ruling the defendants then and there duly except.

Memorandum.—Argument re. acquiescence in partition, &c.

Defendants offer to prove by Juan Lueros that he was present and saw and witnessed the division and partition of this land by the administrators between the devisees, and that they each took possession of their respective portions as early as 1865, and that the partition has been acquiesced in ever since.

All of which is excluded, and the defendants then and there duly except.

And the defendant, by counsel, now moves the court to direct the official stenographer of this court to read all this evidence and have it go to the jury for their action.

Refused; to which defendants then and there duly except.

Memorandum.—Argument re. amount of recovery; Stone, Barnes, Warren, &c.

BARNES: In no view of this case is the plaintiff entitled to recover. He has no cause of action, and if he has he is only entitled to nominal damages, because there is no pretense on the plaintiff's part that he has been disturbed in the possession of the land, and that no actual injury has resulted to him whatever, and because he has not offered to place the defendant *in statu quo*, and that he is in no condition, either in a court of law or equity, to get any relief, and if he was in a court of equity he would have to do equity, &c., and therefore the amount of his recovery here must be nominal damages, and therefore defendants move the court to instruct
72 the jury that the damages in this case can only be nominal, or the sum of one cent; and defendants also move the court to instruct the jury that they must find for the defendants, because the plaintiff cannot recover, and the jury in a cause of this kind must assess the damages, and as they have claimed no damages they have put themselves out of court, &c.

All denied, and defendants then and there except.

COURT: Gentlemen of the jury: There is no question of fact in this case for you to pass upon. There are only questions of law, which it is the duty of the court to pass upon, and the entire responsibility of passing upon such questions is with the court.

The court instructs the jury that it is their duty under the law and the evidence in this case to find a verdict for the plaintiff and assess his damages at the sum of $5,333.33, being the amount of the money paid by him for the land in question.

To which instructions the defendants then and there except, because such instruction is not authorized by law or sustained by the evidence, and the defendants except to the refusal of the court to give the instructions demanded by defendants regarding damages.

Letters of administration offered in evidence by defendants and filed as exhibits herein by defendants, marked Defendants' Exhibits O, P, Q, R, S, by permission of court; to which plaintiff then and there duly excepts.

(PLAINTIFF'S EXHIBIT "A.")

Warranty Deed.

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

This indenture, made this 13th day of May, in the year of our Lord one thousand eight hundred and eighty-two, between
73 Charles W. Lewis and Jessie A. Lewis, his wife, both of Albuquerque, in the county of Bernalillo and Territory of New Mexico, parties of the first part, and Wallace Douglass, of Albuquerque, in the county of Bernalillo and Territory of New Mexico, party of the second part, witnesseth:

That the said parties of the first part, in consideration of the sum of five thousand three hundred and thirty-three 33⅓ (5,333.33⅓) dollars, lawful money of the United States, to them in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the second part, his executors and administrators, forever released and discharged from the same, by these presents have granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey, and confirm, unto the said party of the second part and to his heirs and assigns forever all that certain tract, piece, parcel, or lot of land situate, lying, and being in Las Lagunitas, in the county of Bernalillo and Territory of New Mexico, known, bounded, and described as follows: On the north by lands of James Murphy; on the south by lands of Charles W. Lewis; on the east by the base of the sand hills, and on the west by the Rio Grande, being four thousand seven hundred and eleven (4,711) feet from east to west and one thousand four hundred and ninety (1,490) feet from north to south, and containing one hundred and sixty (160) acres, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents,
issues, and profits thereof, and also all the estate, right, title,
74 interest, dower or right of dower, property, possession, claim, and demand whatsoever, both in law and equity, of the said party of the first part of, in, and to the above-granted premises and every part and parcel thereof, with the appurtenances:

To have and to hold the above mentioned and described premises, with the appurtenances and every part thereof, to the said party of the second part, his heirs and assigns, forever.

And the said parties of the first part and their heirs the above-described and hereby granted and released premises and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said parties of the first part and their heirs and against all and every person and persons whomsoever lawfully claiming or to claim the same or any part thereof shall and will warrant and by these presents forever defend.

In witness whereof the said parties of the first part have hereunto set their hands and seals this 13th day of May, A. D. 1882.

CHARLES W. LEWIS. [SEAL.]
JESSIE A. LEWIS. [SEAL.]

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

On this 13th day of May, A. D. 1882, before me, Melchior Werner, probate clerk, personally came Charles W. Lewis and Jessie A. Lewis, his wife, to me personally known to be the same persons whose names are signed to and who are parties to the foregoing deed of conveyance, and acknowledged that they signed, sealed, and executed the same freely and voluntarily for the purposes therein mentioned; and the said Jessie A. Lewis, being by me first informed of the contents of said deed of conveyance, confessed, on examination separate and apart from and independent of her said husband, that she signed, sealed, and executed the same freely and voluntarily for the purposes therein mentioned without any compulsion or the illicit influence of said husband.

75

Given under my hand and official seal this 13th day of May, A. D. 1882.

[Seal Probate Court.]

MELCHIOR WERNER,
Probate Clerk of Bernalillo Co.

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

I, Melchior Werner, clerk of the probate court, and *ex officio* recorder in and for the county of Bernalillo, in said Territory of New Mexico, certify that the foregoing deed of conveyance was filed in my office for record by Wallace Douglass on the 13th day of May, A. D. 1882, at 5 o'clock p. m., and that the same is duly recorded in Book R of the Record of Deeds of said county of Bernalillo, on page 452.

In witness whereof I have hereunto set my hand and official seal this 18 day of May, A. D. 1882.

[Seal Probate Court.]

MELCHIOR WERNER,
Clerk and ex Officio Recorder,
Bernalillo County, Territory of New Mexico.

Stipulation of Counsel.

In the District Court of Bernalillo County. May Term, 1884.

WALLACE DOUGLASS, Pl't'ff,
vs.
CHARLES W. LEWIS *et al.*, Def'ts. } No. 975.

Covenant.

76 And now comes the attorneys for the plaintiff and also the attorneys for the defendants, and thereupon they stipulate

and agree for the respective parties, plaintiff and defendants, in this said suit, in order to have a full understanding of the case by the supreme court of New Mexico, that the tracing of the original map introduced by the plaintiff and referred to by Max Frost, register of the United States land office, Santa Fé, New Mexico, in his evidence and referred to in the stenographic notes, as also the survey of Paulson, introduced by the plaintiff and read in evidence by them and referred to in the evidence of Surveyor Hill in this case, shall be treated and considered as a part of the record in this case, and that said tracing and survey on file in this suit shall be attached to and accompany the record in this case when made out as though the same had been actually copied into the bill of exceptions in this case, and no advantage shall be taken by either party on the hearing in the Supreme Court because of such papers not being actually copied into the bill of exceptions.

H. L. WARREN,
STONE & STONE,
Attorneys for Plaintiff.
S. M. BARNES,
STEARNS & DOUGLAS,
Attorneys for Defendants.

(Endorsed:) Filed in my office this 20th day of October, 1884. Edmund H. Smith, clerk.

(DEFENDANTS' EXHIBIT I.)

UNITED STATES OF AMERICA,
Territory of New Mexico, County of Bernalillo:

77 Know all men by these presents that I, by my attorney, Guadaloupe Gutierrez, duly authorized to execute deed for me by power of attorney dated July 11th, 1879, Maria Dolores Ladoux, legitimate heir of Maria Apolonia Lucero y Sandoval, deceased, for and in consideration of the sum of one hundred dollars to Guadalupe Guiterrez, as attorney, in hand paid, the receipt whereof is hereby acknowledged, has this day bargained, sold, and conveyed, and by these presents doth bargain, sell, and convey, unto Charles W. Lewis, his heirs and assigns, forever a certain piece or parcel of land, lying and situated in the sitio of Barelas and county of Bernalillo and known as the Lagunitas, measuring from north to south two hundred varas, and bounded on the north by the lands of Jesus Baca, on the south by the lands of Apolonia Lucero y Sandoval, deceased, on the east by the foot-hills, on the west by the Rio Grande del Norte; to have and to hold the said piece or parcel of land to the said Charles W. Lewis, his heirs and assigns, forever in as ample and perfect a manner as the said heir of Maria Apolonia Lucero y Sandoval had and held just before the execution of this conveyance; and I, Guadalupe Guiterrez, as the attorney-in-fact of the heir, Maria Dolores Ledoux, do covenant and agree, for the said Maria Dolores Ledoux, her heirs and assigns, forever with Charles W. Lewis, his heirs and assigns, as follows: That the said Guadalupe Guiterrez, as

attorney of Maria Dolores Ledoux, as shown by power of attorney dated July 11th, 1879, and recorded in Book "G," pages 494 and 495, has full authority to sell and dispose of said piece or parcel of land, and that the same is free from all incumbrances; that the said Charles W. Lewis, his heirs and assigns, shall quietly enjoy the occupancy of said piece or parcel of land, free from all claims or
78 demands of the said Maria Dolores Ledoux, her administrators, executors, and assigns; that the said Maria Dolores Ledoux will defend and protect the said Charles W. Lewis, his heirs and assigns, to the said piece or parcel of land against all claims and demands and against persons claiming to be heirs of the said Maria Apolonio Lucero y Sandoval.

Witness my hand and seal, at Albuquerque, N. M., this 14th day of August, A. D. 1879.

his
GUADALUPE † GUTIERREZ, [SEAL.]
mark.
For Maria Dolores Ledoux.

Witness:
JUAN ROMERO.

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

This day personally appeared before me, Melchior Werner, clerk of the probate court in and for said county and Territory, the above-named Guadalupe Gutierrez, personally known to me as the above-named attorney of Maria Dolores Ledoux, and acknowledged the execution of the above deed to be his voluntary act and deed for the purposes therein mentioned.

Witness my hand and official seal, at Albuquerque, this 14th day of August, A. D. 1879.

[Seal Probate Court.]

MELCHIOR WERNER,
Probate Clerk.

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

I, the undersigned, do hereby certify that the foregoing deed has been recorded on Record Book "G," pages 495, 496, and 497.

In witness whereof I have hereunto set my hand and the official seal this 14th day of August, A. D. 1879.

[Seal Probate Court.]
79 MELCHIOR WERNER,
Probate Clerk and ex Officio Recorder.

(Copy.)

DEFENDANTS' EXHIBIT 2.

TERRITORIO DE NUEVO MEXICO, *Condado de Bernalillo:*

Sepan todos por estas presentes, que yo Maria Dolores Ledoux, residente en La Cueva, Condado de Mora y Territorio de Nuevo Mexico, heredera legitima de la finada Maria Apolonia Lucero y

Sandoval, reposando entera conféandra en la integridad de mi esposo Guadalupe Gutierrez; por este, lo constituyo y apodéro mi unico y legal agente, para que por mi, y en mi nombre, reclame, colecte, reciba, y descargue cuanto sea necesario y requerido, en el enforzamento de mi derecho, reclamo, interes y privilegio como heredera, à los bienes, herencias y tenencias de la dicha finada Ma. Apolonia Lucero de Sandoval.

Para este fin, mi esposo Guadalupe Gutierrez tendrà absoluto poder, entera autoridad, y completa facultad irrevocable.

En cuyo testimonio pongo mi nombre y sello en La Cueva, hoy 11 de Julio, A. D. 1879.

su
MA. DOLORES † LEDOUX. [SELLO.]
marca.

TERRITORIO DE NUEVO MEXICO, *Condado de Mora:*

Ante mi, John Florence, escribano de la corte de Pruebas, en y por dicho Condado y Territorio, personalmente comparecio Ma. Dolores Ledoux, à mi personalmente conoceda, y declaró que ella, firmo sello y ejecuto el antecedente por los intentos y fénes en él especificado.

80 En testimonio de lo cual pongo mi nombre y sello oficial hoy dia 11 de Julio, A. D. 1879.

JOHN FLORENCE,
Escribano.

Enregistrado hoy dia 14 de Agosto, A. D. 1879.
MELCHIOR WERNER, *Clerk.*

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

I, J. L. Perea, Jr., probate clerk and *ex officio* recorder in and for said county, hereby certify that the foregoing is a true copy of the records in my said office, as appears of record in my said office, in vol. G, folios 494 and 495.

Given under my hand and official seal this May 14th, 1884.

[SEAL.] J. L. PEREA, JR.,
Clerk and Recorder,
By C. PIERCE, *Deputy.*

Endorsed: 975. Bern. Co. Filed in my office this 30th day of May, 1884. Edmund H. Smith, clerk.

(DEFENDANTS' EXHIBIT O.)

TERRITORIO DE NUEVO MEXICO, *Condado de Bernalillo:*

Sepan todos por estas presentes como nosotros José Manuel Gallegos, Francisco Tomas Cabeza de Baca, José Serafin Ramires como principales y Manuel Armijo, Nestor Montoya, Antonio Luna,

81 Pedro Armijo, como fiadores somos tenidos y firmemente obligados hacia el Territorio de Nuevo Mexico en la suma de cinquenta mil pesos, al pago de cual, nos obligamos bien y fielmente,

tanto por nosotros mismos, como por nuestros herederos, ejecutores y administrados, en fé de lo cual poemos nuestro nombres y sellos en Bernalillo hoy el dia 3 de Febrero, A. D. 1862.

La condicion de la presente obligacion ó fianza es tal, que por cuanto el dia de hoy han sido nombrados por la Corte de Pruebas del Condado de Bernalillo los Señores Manuel Gallegos, Francisco Tomas Cabeza de Baca y José Serafin Ramires, administradores legales de todos los bienes del finado Don Antonio Sandoval, Ahora, si los dichos administradores dan cuanta, pagan y entregan todos los dineros y propriedades del dicho finado a los herederos legales del dicho finado, y harán todos las demas cosas, que les son requeridas por la ley, para el fiel cumplimiento de sus deberes como tales administradores, entonces esta fianza será nula y de ningun valor, de lo contrario quedasá en toda su fuerza y efecto.

JOSE M. GALLEGOS. [SELLO.]
TOMAS C. DE BACA. [SELLO.]
JOSE SERAFIN RAMIRES. [SELLO.]
NESTOR MONTOYA. [SELLO.]
ANTONIO LUNA. [SELLO.]
PEDRO † ARMIJO. [SELLO.]
su
MANUEL ARMIJO. [SELLO.]
firma

Certifica que hoy 3 de Febrero de 1862, hé enregistrado la antecedente fianza.

NESTOR MONTOYA,
Diputado Escribano de la Corte de Pruebas.

82 TERRITORY OF NEW MEXICO, *County of Bernalillo:*

I, J. L. Perea, Jr., probate clerk and *ex officio* recorder in and for said county, in the Territory aforesaid, do hereby certify that the above and foregoing is a true and correct copy as appears from the records now in my office.

Witness my hand and official seal this 30th day of May, A. D. 1884.

[SEAL.]

J. L. PEREA, JR.,
Probate Clerk and ex Officio Recorder,
By L. T. ROBERTS, *Deputy.*

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

I, J. L. Perea, Jr., probate clerk and *ex officio* recorder in and for said county, in the Territory aforesaid, do hereby certify that the above and foregoing is a true and correct copy as appears from the records now in my office.

Witness my hand and official seal this 30th day of May, A. D. 1884.

[SEAL.]

——— ———,
Probate Clerk and ex Officio Recorder,
Per ——— ———, *Deputy.*

(Endorsed:) 975. Filed in my office this 30th day of May, 1884. Edmund H. Smith, clerk.

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DEFENDANTS' EXHIBIT "P."

TERRITORIO DE NUEVO MEXICO, *Condado de Bernalillo:*

83 Personalmente de presentó ante mi, Pedro Lopez, uno de los Jueces de Paz de precinto numero 7 del Condado y Territorio arriba dicho, Nestor Montoya y bajo su juramento decio que el sin parcialidad, y la mejor de su capacidad cualuará los hierres del finado Don Antonio Sandoval, segun llegeren a su nista y conociniento.

NESTOR MONTOYA.

Juramentado y subscrito ante me, hoy el dia 5 de Febrero, A. D. 1862.

(Firmado) PEDRO LOPEZ,
Juez de Paz.

Certifico hoy 5 de Febrero de 1862 que he enregistrado la antecedente declaracion juramentado.

NESTOR MONTOYA,
Diputado Escribano de la Corte de Pruebas.

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

I, J. L. Perea, Jr., probate clerk and *ex officio* recorder in and for said county, in the Territory aforesaid, do hereby certify that the above and foregoing is a true and correct copy as appears from the records now in my office.

Witness my hand and official seal this 30th day of May, 1884.

[SEAL.] J. L. PEREA, Jr.,
Probate Clerk and ex Officio Recorder,
By L. T. ROBERTS, JR., *Deputy.*

(Endorsed:) 975. Filed in my office this 30th day of May, 1884. Edmund H. Smith, clerk.

84 (DEFENDANTS' EXHIBIT "Q.")

TERRITORIO DE N. MEXICO, *Condado de Bernalillo:*

Por cuanto la corte de pruebas del condado de Bernalillo en el Territorio de Nuevo Mexico ha sido informado que el Señor Don Antonio Sandoval, residente del dicho condado y Territorio, murió en el dicho Condado y Territorio, el dia veinte y cinco de Enero, del año del Señor de mil sesenta y dos, habiendo testado el dia once de Junio, del año de 1860; cuyo testamento ha sido oprobado por dicha corte, dejando en el dicho Condado y Territorio propiedades y bienes que pueden ser perdidos ó disminuidos en su valor, no habiendo un administrador que tenga cuidado de ellos; y por cuanto, los Señores José Manuel Gallegos, Francisco Tomas Cabeza de Baca y José Serafin Ramires han hecho aplicacion á la dicha Corte de Pruebas, para obtener letras testamentarias y de administracion de dichos bienes,

y han prestado el debido juramento, y dado las correspondientes fianzas, para el fiel cumplimiento de sus deberes como tales administradores. Por lo tanto:

Yo, Julian Perea, Juez de Pruebas, en y por el Condado de Bernalillo, en el dicho Territorio, en virtud de la autoridad en mi conferida por la ley, he nombrado y por estas presentes nombro y declaro á los dichos Señores José Manuel Gallegos, residente del Condado de Santa Fé; Francisco Tomas Cabeza de Baca, residente del Condado del Santa Ana; y Jose Serafin Ramires, residente del Condado de Bernalillo, administradores legales de todos los hienes y propiedades, dineros y creditos, derechos y privilegios, que éran al tiempo de su muerte del dicho finado Don Antonio Sandoval. Entendido que los dichos administradores deberán dar cuenta
85 de ellos á ésta corte cada un año, hasta la conclucion final de su administracion, y hacer todas las demas cosas relativas á la dicha administracion como requerido por la ley, ó por orden de esta corte, ó cualquier otra corte teniendo jurisdiccion en el asunto.

En testimonio de lo cual pongo mi nombre oficial, y causo que el sello de la Corte de Pruebas del dicho condado, sea estampado en estas letras testamentarsas y de administracion, dadas en Bernalillo hoy el dia tres de Febrero año del Señor de mil ocho-cientos sesenta y dos.

[Firmado.] JULIAN PEREA,
Juez de Pruebas.

Certifico que hoy 3 de Febrero del año del Señor de 1862, he enregistrado las antecedentes letras de administracion.

NESTOR MONTOYA,
Diputado Escribano de la Corte de Pruebas.

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

I, J. L. Perea, Jr., probate clerk and *ex officio* recorder in and for said county and Territory aforesaid, do hereby certify that the above and foregoing is a true and correct copy as appears from the records now in my office.

Witness my hand and official seal this 30th day of May, A. D. 1884.

[SEAL.] J. L. PEREA, JR.,
Probate Clerk and ex Officio Recorder,
By L. T. ROBERTS, JR., *Deputy.*

86 (Endorsed:) Filed in my office this 30th day of May, 1884. Edmund H. Smith, clerk.

(DEFENDANTS' EXHIBIT "R.")

TERRITORIO DE NUEVO MEXICO, *Condado de Bernalillo:*

Personalmente se presento ante mi Julian Perea, Juez de Pruebas del Condado y Territorio arriba dicho Facundo Pino, y bajo de su juramento declaró que el sin parcialidad y a lo mejor de su capa-

cidad avaluará los bienes del finado Don Antonio Sandoval, segun lleguen bajo su vista y conocimiento.

FACUNDO PINO.

Juramentado y subscrito ante mi, hoy el dia 3 de Febrero, A. D. 1862.

(Firmado) JULIAN PEREA,
Juez de Pruebas.

Certifico hoy 3 de Febrero, A. D. 1862, que he enregistrado la antecedente declaracion jurada.

NESTOR MONTOYA,
Diputado Escribano de la Corte de Pruebas.

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

I, J. L. Perea, Jr., probate clerk and *ex officio* recorder in and for said county, in the Territory aforesaid, do hereby certify that the above and foregoing is a true and correct copy as appears from the records now in my office.

Witness my hand and official seal this 30th day of May, A. D. 1884.

[SEAL.] J. L. PEREA, JR.,
Probate Clerk and ex Officio Recorder.

87 (Endorsed:) 975. Filed in my office this 30th day of May, 1884. Edmund H. Smith, clerk.

(DEFENDANTS' EXHIBIT "S.")

TERRITORIO DE NUEVO MEXICO, *Condado de Bernalillo:*

Personalmente se presentason ante mi Julian Perea, Juez de Pruebas del Condado, y Territorio arriba dicho las Señores José Manuel Gallegos, Francisco Tomas Cabeza de Baca, y José, Serafin Ramires, y bajo de su juramento declaráson que ellos bien y fielmente, administrarán los bienes del finado Don Antonio Sandoval; que harán un inventario exacto y completo de todos los bienes y propiedades de dicho finado; y que cumplirán y ejecutaráu la ultima voluntad testamentaria de dicho finado, y que harán todas los demas cosas relativas a la dicha administracion como requerido por la ley, ó por orden de esta corte, ó cualquiera otra corte teniendo jurisdiccion, con debida delegincia.

JOSE MANUEL GALLEGOS.
TOMAS C. DE BACA.
JOSE SERAFIN RAMIRES.

Juramentados subscritos ante mi, hoy el dia 3 de Febrero, A. D. 1862.

JULIAN PEREA,
Juez de Pruebas.

Certifico haber enregistrado el antecedente juramento hoy 3 de Febrero de 1862.

NESTOR MONTOYA,
Diputado Escribano de la Corte de Pruebas.

88 TERRITORY OF NEW MEXICO, *County of Bernalillo:*

I, J. L. Perea, Jr., probate clerk and *ex officio* recorder in and for said county, hereby certify that the foregoing is a true copy of the records in my said office as appears of record in my said office, in vol. G, folios 494 and 495.

Given under my hand and official seal this May 14th, 1884.

J. L. PEREA, JR.,
Probate Clerk and ex Officio Recorder,
By L. T. ROBERTS, JR., *Deputy.*

(DEFENDANTS' EXHIBIT V.)

Hijuela de Guadalupe Sandoval quien fue instituida heredera por el finado Antonio Sandobal y Tafolla, y debeheber por todos sus derechos sobre el capital inventariado de dicho finado, la suma de 43,516 pesos 34 centavos y 4-4 de c. Y para su pago se le adjudican los bien es siguientes:

PRIMERANENTE EN BIENES RAICES.

No.			
1	Dos mil p's en el citio de Agua Negra	2,000	
2	Cien p's en el citio del Ojo los Meganos	100	
3	Cuatrocientos cuarento p's cuarenta centavos en el cito de San Antonio de Corrales	400	40
4	Mil seiscientos p's en el citio de Barelas	1,600	
5	Veinte y cuatro p's en varios pedazas de tierra en Alameda	24	
6	Doscientos diez p's cuarenta centavos en		
89	verios pedazos de tierra en Bernalillo	110	40
7	Mil trescientos treinta y tres p's y treinta y tres centavos, un octavo tercera parte del valor de la casa del finado, Barelas	1,333	33⅓

EN DINERO QUE SEDEBE AL ESTADO.

8	Cinco mil cuatrocientos p's en una deuda del Gobierno Mexico	5,400	
9	Ocho mil trescientos ocho p's secenta y cinco centavo en deuda contra Juan de Dios Marques de Ourango	8,305	65
10	Dos mil contra Juan Nepomuceno Viquide del Estado Chihuahua	2,000	
11	Mil quinientos ochenta p's contra Francisco Chavez y Perea	1,580	
12	Novecientos treinta y tres p's veinte centavos en Juan Houghton	933	20
13	Trescientos dies y ocho p's cuarento y ciete centavos en Felix Benabides	318	47½
		25,048	45½

	Suma de la Vuelta	25,048	45⅜
15	Seiscientos ochenta p's en el extrangero Saco Schinger	680	
16	Quinientos veinte y seis p's secenta centavos en José Manuel Cordova	526	60
17	Quinientos veinte y seis p's en Manuel Barela	526	
18	Trescientos cuatro p's ochenta centavos en Lorenzo Marquez	304	80
19	Doscientos secenta y cinco p's en José Manuel Marquez	265	
90 20	Doscientos ochenta y cuatro p's cuarenta centavos en Clemente Saracino	284	40
21	Cuatrocientos veinte y ciete p's veinte centavos en Antonio Maria Sanches de Santa Fé	427	20
22	Cuatrocientos ochenta pesos en el Estado finado José Maria Miera y Pino	480	
23	Cuatrocientos noventa y un p's cuarenta centavos en una	491	40
24	Doscientos veinte y seis p's ochenta centavos en Pedro Ronquillo	226	80
25	Doscientos veinte p's en Manuel Doroteo Pino	220	
26	Cuatrocientos p's en Miguel Pino Santa Fé Recivi el pago	400	
27	Setecientos cincuenta p's en Antonio José Rivera y su esposa Santa Fé	750	
28	Cuatrocientos veinte p's en Santiago Gonzales	420	
29	Trescientos quince p's en José Griego	315	
30	Doscientos p's en el Antonio Roble	200	
31	Ciete p's dies y ocho centavos en Pedro Cleto Lopez	7	18
32	Catenta y ocho p's Henry Henry	78	
33	Cincuenta p's en Manuel Sabedra	50	
34	Cincuenta p's en Francisco Armijo	50	
35	Veinte p's en Rafaela Ruiz	20	
36	Seis p's en José Dolores Baca	6	
37	Veinte y ocho p's cecentra y ciete centavos en Pablo Sisneros	28	67
		31,805	50⅜
	Suma del fiente	31,805	50⅜
	38 Cien p's en Julian Guaken	100	
91	39 Quince p's veinte centavos en Manuel Antonio Aragon	15	20
	40 Doce p's en Ma. Gallegos de Barelas	20	
41	Noventa y nueve p's viente centavos en Juan Chavez	99	20
42	Treinta y nueve p's veinte centavos en José Rafael Montoya	39	20
43	Seiscientos ochenta p's en Juan Archibeque, pago Juan Archibeque	680	

44	Diez p's en Rumualdo Archibeque	10	
45	Veinte y dos p's en Miguel Lucero	22	
46	Veinte p's en Miguel Lerna	20	
47	Treinta p's en Lucas Gurulé	30	
48	Cuarenta p's en José Man'l Sabedra	40	
49	Veinte p's en Roman Baca	20	
50	Noventa nueve p's en Ambrosio Chavez	99	
51	Cuarenta y un p's cuarenta centavos en Anto. Roman Jaramillo	41	40
52	Doscientos secenta y cuatro p's Manuelito Chavez de Sebolletta	264	
53	Ciento veinte y un p's setenta centavos en Pablo Pino	121	70
54	Veinte y ciete p's doce centavos en Juan Garcia	27	12
55	Dos p's ochenta centavos en Pedro Baca	2	80
56	Veinte p's en Anto. José Molina	20	
57	Seis p's ochenta centavos en Anto. Esperillon Sabedra	6	80
58	Seis p's ochenta centavos en Man'l Sabedra de Sebolletta	6	80
59	Quince p's secenta centavos José Dario Sabedra	15	60
60	Tres p's veinte centavos Juan Alfara	3	20
		33,509	52½
92	Suma de vuelta	33,509	52½
61	Cecenta p's en Blaz Lucero	60	
62	Ciento secenta y seis p's secenta centavo en José del Balle	166	60
63	Once p's en Julian Tenorio	11	
64	Veinte p's en Juan José Lucero	20	
65	Diez nueve p's treinte y ciete un cuatro centavos en Marcos Sanches Vergara	19	37½
66	Cuatro p's ochenta centavos en Ma. de Jesus Lucero	4	80
67	Ocho p's en Juan José Gonzalez	8	
68	Veinte p's en José Gonzalez y en es-		
69	Cecenta p's en José Gonzales y su esposa, posa	60 20	
70	Ochenta y nueve p's ochenta centavos en Diego Gomez	89	80
71	Mil cuarenta p's en Gervacio Nolan	1,040	
72	Quinientos setenta y ciete p's en Juan Ortega	577	
73	Cuarenta y un p's veinte centavos en Roman Ortega	41	21
74	Ocho p's en José Ma. Benabides	11	
75	Secenta p's en Tomas Salanda	60	
76	Doscientos cincuenta y tres p's cuarenta centavos en Francisco Esquivel de Mora	253	40
77	Diez y seis p's en Bueneventura Lovato	16	

78	Tres p's cincuenta centavos en José Francisco Fernandez	3	50
79	Cincuenta y cuatro p's cincuenta y cinco centavos en Juan Antonio Sarracino	54	55
93	80 Trienta y cuatro p's en José Rafael Garcia	34	
	81 Secenta p's en José Anto. Chavez	60	
82	Doce p's en José Marcos Labato	12	
83	Trienta p's viente centavos en Ma. de la Luz Chavez	30	20
		36,161	95⅝
	Suma del fiente	36,161	95⅝
84	Secenta p's en Salvador Jaramillo	60	
85	Cuarenta p's en Guadulupe Jaramillo	40	
86	Cuarenta p's en Teodoro Armijo	40	
87	Cecenta y un p's cecenta centavos en Mariano Montoya	61	60
88	Veinte y cuatro p's en Francisco Salar	24	
89	Cuarenta p's en el estado del finado Diego Amijo	40	
90	Ochenta y ciete p's ochenta centavos en José Salazar	87	80
91	Veinte y ciete p's ochenta centavos en Tomas Baca de Belen	27	80
92	Cuarenta p's en Monico Pino	40	
93	Veinte p's en Teodoro Armijo	20	
94	Treinta y un p's cuarenta centavos en Anto. Ma. Lopez	31	40
95	Diez y ocho p's cecenta centavos en Deciderio Griego	18	60
96	Ciento cetenta y nueve p's veinte centavos en Pablo Griego	179	20
97	Treinta y ocho p's secenta centavos en Mig'l Anto. Lobato	38	60
98	Cecenta y cuatro p's en Torrivio Rea	64	
99	Trienta p's en Damacio Martin y Ortega	30	
	100 Diez p's en Estafana Roibal	10	
94	101 Veinte p's en Nicolas Quintana	20	
	102 Setenta p's en Daniel Sandoval	70	
103	Veinte p's en Luis Sanchez	20	
104	Veinte p's en Felipe Aragon	20	
105	Treinta p's en Miguel Cena y Romero	30	
106	Diez y seis p's Juan Pablo Martin	16	
107	Once p's cecenta y cinco un octavo centavo en Anto. Sanchez	11	65⅛
		37,162	60⅝
	Suma de la vuelta	37,162	60⅝
108	Cuatro p's en Balentin Samora	4	
109	Ciete p's noventa centavos en Manuel Sabedra	7	90

110	Ciento diez y seis p's veinte centavos Jesus Cardenas	116	20
111	Setenta y un p's secenta centavos en Francisco Ruiz	61	60
112	Seis p's veinte y cinco centavos en José Anto. Montoya	6	25
113	Ocho p's en Manuel Anto. Aragon	8	
114	Veinte y cinco p's veinte centavos en José Anto. Baca	25	20
115	Ciento ciete p's secenta centavos en Juan José Garcia	107	60
116	Cincuenta un p's en Joaquin de Luna	51	
117	Ciento cincuenta y cinco p's cuarenta centavos en Rafael Chavez	155	40
118	Treinto y cinco p's cuarenta centavos en Juan Gutierrez	35	40
119	Ciento cuarenta y tres p's cuarenta centavos en Diego Martin	143	40
	120 Cinco p's diez centavos en Santiago Nevarez	5	10
95	121 Once p's cincuenta centavos en Juan Albino Gonzalez	11	50
122	Ciento diez p's veinte centavos en Juan Nepomucino Montoya	110	20
123	Cincuenta p's veinte centavos Juan Montoya de Corrales	50	20
124	Cincuenta y un p's veinte centavos en Juan Garcia Casa Colorado	51	20
125	Setenta y dos p's veinte centavos en Fernandez Gutierrez	72	20
		38,184	95½
	Suma del fiente	38,184	95½
126	Veinte p's Eulogio Sabedra	20	
127	Diez p's en Luez Sanchez	10	
128	Nueve p's en Rumaldo Gallego	9	
129	Treinta y un p's cuarenta centavos An'to Ma. Lopez	31	40
140	Cuatro p's en Juan de la Cuez Gonsales	4	
141	Doce p's en Juan Pablo Mestas	12	
142	Catorse p's en Roque Chavez	14	
143	Ciento doce p's cincuenta centavos en Juan de Jésus Baldez	112	50
144	Blaz Chavez sobre veinte y ocho reces al partido, corresponden á cada heredoro nobenta y vueve p's	99	
145	José Maria y Leonardo Tafollas sobre cuatro mil cien obejas el partido corresponde á cada heredero avaluados á pi	820	

146	José An'to Chavez de padillas sobre mil docientas y setenta y dos obejas al partido valuado cada cabeza á 12 rs. corresponde á cada heredero trecientos ochenta y un p's secenta centavos	381 60
147	Nepomuceno Carabajal sobre mil irece obejas al partido valuadas á un p's obeja corresponde á cada heredero docientos dos p's secenta centavos	202 60
148	En Jesus Miera quenientas obejas al partido á doce riales cabeza	750
149	En Juan Domingo Montoya cuarenta obejas á un p's	40
150	En Juan Miera cuatro cientas ochenta obejas al partido á 12 rs. cabeza	720
151	En Ambrocio Gonsales trecientas obejas al partido á rs. cabeza	450
		41,861 05
	Suma de la vuelta	41,861 05
152	En Juan Griego de Chilili ciento secenta y 8 cabras a p's cabeza, corresponde a cada heredero sobre ochocientas cuarenta cabras.	162
153	En Cleto Lopez ochenta cabras al partido en 1 p's cuyo numero del principal tatales de cuatrocientas cabras	80
154	En reses recividas por la parte	170
155	Por la quinta haste aplicable de dos mulas y un caballo 9e. debe José Manuel Savedra	22 00
97	156 Se aplica 5a. parte de un caballo 9e. dehe Antonio José Martin, valuado en 20 p's.	4 00
	158 Se le aplica la 5a. parte sobre dos bueyes prestados 9e. debe, Juan Chaves, valuados en 30 p's	6 00
159	Se aplica la quinta parte sobre dos buyes 9e. tiene prestado Mig'l Samora, valuados en 30 pesos.	6 00
160	Se aplica la 5a. parte sobre dos bueyes 9e. tiene prestados Getrudis Sanches, valuados en 30 p's.	6 00
161	Treinta y ocho castales de mais á 2 p's	76 00
162	Un burro manadero cien p's	100 00
163	Una burra panda en Veinte p's	20 00
164	Una mula balla en 30 p's	30 00
165	Doscientos carneros á 1 p's	200 00
166	Veinte y nueva ovejas de patenario á 12 rs	43 00
166	Ciento cincuenta p's en Man'l Garcia	150 00
167	Veinte y cuatro valor de trigo recivido en la casa de Pedro Armijo	24 00
168	Dos espejos redondos valuados á 20 p's	40 00
169	Uno id cuadrilongo valuado en 25 p's	25 00

	Ocho pesos treinta centavos valor de la 3d parte de otro, id., id.	8 30
	Ocho pesos treinta y tres centavos valor de la parte de un perol deco bre	8 33
		43,042 38½
	Suma de la vuelta	43,042 38½
98	Tres pesos treinta y tres centavos por la parte de una estufa	3 33
	Seis pesos ochenta centavos por la parte en un catre	6 80
	Seis pesos por la parte 9e. le tocó de dos resesque se vendieron	6 00
	Un carro viejo en 30 p's	30 00
	En muebles, efectos y otros varios articulos que se repartieron, y la parte recivió el valor de 334 p's, 81 centavos un cuarto	334 81¼
	Tres silletas en 9 p's	3 00
	Noventa pesos uno y medio centavos, en ornamentes, muebles y adorno de la capilli que recivió en la reparticion	90 01½
	Suma total recibida	43,516 34

Los abajo subscutos administradores y ejecutores del estado de los bienes del finado Antonio Sandoval certificamos que la antecedente Hijuela es una verdadera adjudicacion echa en favor de Guadalupe Sandoval como heredera instituida por el dicho finado Antonio Sandoval que le corresponde por todos sus derechos de los bienes, raices muebles semovientes deudas y demas qué ha lleguedo á muestra noticia y conosimiento y constan en favor de dicho estado; por lo tanto nosotros los dichos administradores y ejecutores declaramos qué la citado Guadalupe Sandoval, élla sus herederos sucesores, administradores y asignatarios tienen derecho de cobrar, recivir y tomar posesion de dichos bienes, a éllos adjudicados conforme su voluntad; para lo cual le damos la presente 9e. firmamos y sellamos, en
99 Peña Blanca este dia veinte y cuatro de Mayo del año del Señor de mil ochocientos sesenta y dos.

Agoste 23 de 1865.

JOSE SERAFIN RAMIRES, [SELLO.]
TOMAS C. DE BACA, [SELLO.]
JOSE M. GALLEGOS, [SELLO.]
Administradores y Ejecutores.

La partido 9e. posteriormente aparece dislutuida correspondiente al estado del finado An'to Sandoval (entre uno de sus herederos) se hará constar en el ynventario.

Albuquerque, Agosto 23 de 1865.

J. M. GALLEGOS.

Se carga de redito de Guadalupe Sandoval lo siguinte. En Juan An'to Chavez doscientas cuarenta y cinco cabras a 1 pso. cabeza, 245.00.

(Endorsed:) 975. Bern. Co. Filed in my office this 30th day of May, 1884. Edmund H. Smith, clerk.

(Copy.)

DEFENDANTS' EXHIBIT "W."

TERRITORIO DE N. MEXICO, *Condado de Bernalillo:*

En el nombre de Dios todo poderoso amen: Yo, Antonio Sandoval y Tafoya, residente en los Varelas y del Territorio y Condado ante dicho, hijo legitimo y de legitimo matrimonio, de Don José Sandoval y de Doña Apolonio Tafoya, ya defuntos, naturales del propio Territorio referido, hallandome por la Divina Providencia bueno, y sano, en mi entero cabal juicio, memoria y entendimiento natural, creyendo y confesando como firmemente creo y con-
100 fieso, al altisimo é enfalible misterio de la Veatisima Trinidad, Padre, Hijo, y Espiritu Santo; tres personas que aunque realmente distintas, tienen los mismos atributos, y son un solo Dios verdadero, una esencia y sustancia, y todos misterios y sacramentos que tiene, cree, y confiesa, nuestra Santa Madré Yglesia (C. A. R.) en cuya verdadera fé, creencia, he vivido, vivo, y protesto vivir y marir, como Catolico fiel Cristiano, tomando por mi intersesora y protectora, á la siempre Virgen Maria, é immaculada Reyna de los Angeles, Madre de Dios, y Señora Nuestria; él Santo Angel de mi guarda, los de mi nombre y devocion, y demas de la corte celestial; para que impetren de nuestro Señor Jésu Cristo; que por los infinitos meritos, de su presiossima vida, pasion y muerta, me perdone, todas mis culpas y pecados, y lleve mi alma a descansar, y á gorar de su veatifica presencia, temerooso de la muerte, que es natural y presisa á toda creatura humana, y su hora incierta; para esta prevenido con disposicion testamentaria cuando llegue el caso, pues, me hallo bien avansado en la vida por que edad—por tanto: con maduro acuerdo hoy, en mi entero juicio, mente y memoria sana, hago, ordeno, publico y declaro esta, mi ultima voluntad y testamento, y enitar con claridad, las dudas y pleitos que pudieran suscitarse despues de mi muerte, y para no tener á la hora de esta, algun cuidado temporal, que me obste pedir á Dios de todas veras, la remision que espero de mis pecados: otorgo, hago y ordeno mi testamento, en la forma sigiente: Primeramente, encomiendo mi alma a Dios nuestro Señor, que de la nada la crio, y el cuerpo a la tierra de que fué formado, el que hecho cadaver, mando se amortage con el habito de nuestro Serafin Padre, San Francisco; y se sepulte en la Yglesia parroquial en donde al tiempo de morir fuere parroquiano—es mi voluntad que asistan á mi entierro, los sacerdotes que
101 se puedan reunir a los veinte y cuatro horas despues de mi fallecimiento—Ytem: mando; que el sigiento dia de me

fallecimiento, y a la hora de mi entierro, se celebre por mi alma, misa cantada de cuerpo presente, con diacono y subdiacono, nigilia y responso, y al oficiarlo asista el manero de sacerdotas preferido, por todo lo cual so pagará la limosna acostumbrada—Ytem: mando, que el otro dia despues de mi entierro se prosiga un novenario de misas cantadas sin diaconos; las honras y cabo de ano lo mas closin que lo permitan las circumstancias—Ytem: mando, que se celebren, quinientas misas resados, por mi alma, las de mis Padres y Abuelos, y demas de mi obligacion, satisfaciendo por cada una, la limosna que se acostumbra pagar, de que sacada la cuarto parte perteneciente á la Parroquia; las restantes se celebrarán en las Yglesias y Altares que elijan mis testamentarios—Ytem: mando, por una vez para la concervacion de los Santos lugares, y tierra Santa, redencion de cautivos Cristianos y demas mandos forsosos, veinte relases [reales] por una sola vez—Ytem: lego a mis hermanas que sobrevivieran á mi fallecimiento, y que estabieren en mi asistencia al tiempo de el, la casa de mi morada con todos los utensilios y ajuar de casa, que le corresponden, y tenga actualmente al tiempo de mi muerte, y les pido me encomienden a Dios—Ytem: declaro tener cuatro criados, que conmigo viven y son Francisco Antonia, Daniel y José, a quienes lego y mando se les dé á cada uno, dos vacas ó su valor, un caballo ó uno Segur y á mas doscientas varas de tierra en Atrisco, las cuales les serán repartidas por iguales partes, y les pido me encomienden a Dios—Ytem: mando que á la mas de la parte que le toque segun la clausula anterior, le lego la cama de mi uso, con sus correspondientes sabanas, y le encargo rueque á Dios por mi alma—Ytem: mando, que las dos clausulas anteriores gozarán beneficio de ellos, ellos y sus decendientes que se halleran vivos despues de mi fallecimiento—Ytem: mando, que todos los mozos que tengo acomodados, sea cual fuere la cantidad que me debiera al tiempo de mi muerte, quedan libres, y les pide ruequen á Dios por mi—Ytem: declaro que fui casado legitimamente "in facie Ecclesia" con Doña Ursula Chavez, y a defunta, y en cuyo matrimonio no tuvimos ni procreamos ni un hijo—Ytem: mando, que dos Documentos, fechados el primero, el año de 1830, el dia 19 de Julio, in la Plaza de Padillas, y el segundo, el dia 6 de Febrero, de 1835, en Albuquerque: el primero autorizado por el Juez, Don Lorenzo Abeytia, y el segundo, por Don Julian Tenorio, con sus correspondientes testigos, una y otra escritura; ambos relativas á declarar por universal heredero, de la parte que le correspondiere por legitima, principal y gananciales, al que sobre viva de ambos dos, yo y mi esposa, Da. Ursula Chavez, por no tener ni yo, ni mi sitada esposa, herederos forsosas, y mutuamente el uno al otro convenimos, segun nuestra deliberada voluntad: ye en esta clausula mando, y encargo á mis testimentarios nombrados en ésta mi testamento, que si necesario fuere y en cualesquier tiempo durante su encargo, los agreguen á este para aclarar algun dudas que pudieran subsitarse, á causa de la institucion, que hoy hago en ésta mi ultima voluntad—Ytem: declaro, gree hace dos años poco mas o menos, que mi casa fue abierta á deshoras de la noche, abierta y sobada, por una gavia de ladrones, y estas robáron dinero, alajas, y quemáron y robaron papeles y

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escrituras importantes, mando, que si algunas aparecieren cobrando las dichas escrituras, no sean acreditados, ni en juicio, ni fuera de el, excepto, si estubieran traspasadas legalmente segun derecho—Ytem:

103 declaro que el finado Don Francisco Sarrasino, tenio en su poder como mi agente y apoderado, algunos papeles, libros y escrituras de consideracion, y felleció antes de entregarmelas, y despues de su muerte me han sido entregados algunas, por su administrador, Don Juan Antonio Serrasino, faltando la mayor parte, entre estos una escritura de mas de cincuenta mil pesos. Otra del Senor Don Juan Nepo. Orquide del estado Chihuahua, y el iro Don Juan de Dios Marquos, del estado de Durango, y temeroso de que maliciosamente puedan reclamar personas sin ningun derecho á ellas, mando que se procedos segun la clausula anterior.

Item. Mando, que al tiempo de mi falle cimiento, se repartan á los pobre de solemnidad, mil pesos; entre vindas, huer fanos é impedidos, dejando al juicio y conciencia de mis testamentarios la concideracion de la necessidad de cada uno; y la cantidad que a cada uno, se le gradue segun sus circumstancias; y que sea, en cosas para su mantencion y desmudes, y que los precios á que se les den las coas. sean los mas equitativos, y les pido ruequen á Dios por mi.

Item. Mando que todos las dependacias que se me deban al tiempo de mi fallecimiento, se cobren; pero con la condicion, que a ningun pobre se la priva de su caso, y la terra presisa para la mantencion de su familia.

Item. Mando, que á los herederos del difunto Don Francisco Sarracino (por lo que este me debia), á las del finado Don Juan Antonio Rael, y a Dn. Serafin Ramires ó sus herederos, no se les cobre nada de lo que me deban, pues asi es mi voluntad el hecarlo; y les pido ruequen a Dios por mi.

Ytem. Declaro, no estar exentos les herederos por lo que ellos deban.

104 Ytem. Si entre mis papelas ó en poder de mi confesor, se halláre una memoria firmada de mi puña ó escrita por mi, aunque no este firmada, que contenga mandus, declaraciones ú otros cosas concernientes a mi ultimo voluntad; mando que se tenga y estime por parte de este testamento; que se protocolaza con él en los registros publicos, despues de mi fallecimiento, y que su contesto se observe intrigo é enviolablemente; pues asi es me voluntad, pero no estando escrita ó firmada por mi, no haga fé judicial, mi extrajudicialmente.

Ytem. Declaro, tener un regular caudal, que se compone de algunos miles de obejas, vacas, mulas y bestias, caballares, tierras, cosas en diferentes partes del Territorio, dependencia, escuturas, obligaciones de dinero á redito, y otros deudas; libros do caja, y manuales dependencias en algunas individuos de la Republica de Mexico, y obligaciones que acreditan la deuda que se me debe por el Gobierno de Mexico, por préstamos que le hice en los años de 1844 y 1845, y para complier to lo pio que contubiere la memoria (en caso de dejarla), nombro por mis testimentarios y albaceas, á Don Serafin Ramires, Don Tomas Cabeza de Baca, y Don José Manuel Gallegos; y a cado uno in solidum, y les confeso amplio poder y autor-

idad para que despues de mi fallecimiento, determinen y ejecuten, y se apoderen de mis bienes, y cumplan por si extrajudicialmente, y sin intervencion de juez, paguen mis mandos legadas, y cumplan, y paguan todo segun el tenor de esta mi ultima voluntad; y si alguno celificase legalmente una deuda contra mi, mando la paquen, cuya encargo les dura un a ño legal, y el mas tiempo que necesitaren, pues se prorrogo.

Y despues de cumplido y pagado todo, y por cuanto me hallo sin decendientes legitimos, y sin herederos forsosus, segun las leyes generales y particulares de este Territorio, y usando de la potestad que ellas me conceden, instituyo por mis unicus, y univer-
105 sales herederos del remaniente de mis bienes, derechos y acciones, á mis hermanas que son; Josefa, Manuela, Juana, Catarina, y Guadalupe, y sus hijos y suscesores.

Y por el presente revoco y anulo, todos los testamentos y demas disposiciones testamentarias, que antes de ahora, haya formalizado por escueto, de palabra, ó en otra forma, para que ninguna valza, ni hapa fé judicial, ni extra judicialmente, excepto, éste testamento, y memorid citada, que quiero y mando, se estime y tongo, y por mi ultima deliberada voluntad, á lo via y forma que mejor haya lugar en derecho; pues es declarado auteriti camente, y publicado por mi, Antonio Sandoval y Tafoya, en la plaza de Alameda; en testimonio de lo cual, pongo mi nombre y sello, este dia, once de Junio del año de Nuestro Señor, de mil ochocientos sesenta.

ANTONIO SANDOVAL.

(*Certificacion.*)

La Escritura antecedente faé dictada y firmada por el dicho Antonio Sandoval y Tafoya, en nuestra presencia, y conocido por el, y cada uno de nosotros, en su entero juicio, mente y memoria sana, declaro, la dicha escritura asi firmada á ser su ultima voluntad y testamento, y nosotros, á la solicitad del Testador, nos presenciamos en su presencia de él, hemos firmado como testigos.

(Signed) ANTONIO LERMA.
JOSE DEL VALLE.
LORENZO MONTANO.
RAFAEL MIERA.
JOSE MIGUEL LUCERO.

TERRITORIO DE N. MEXICO, *Condado de Bernalillo:*

Por cuanto de la examinacion de los testigos que presenci-
106 aron á la otorgacion y ejecucion, del antecedente testamento, y ultima voluntad del finado, Don Antonio Sandoval, ha resultado evidentamente probado que el dicho gnado, á la otorgacion de su dicha testamento y ultima voluntad, se hallaba en su sano y entero juicio, y con entera libertad, y que el antecedente testamento y ultima voluncad es el mismo ejecutado por el dicho finado. Por lo tano; yo, Julian Perea, Juez de Pruebas en y por el Condado de Bernalillo en el Territorio de Nuevo Mexico, en vertud de la

autoridad á mi conferida por la ley, apruebo, publico, y declaro, el antecedente testamento, y ultima voluntad, como el testamento legal y verdadero, del finado Don Antonio Sandoval, y decreio que sea ejecutado por sus albaceas y administradores, en todas sus partes.

En testimonio de lo cual, pongo mi nombre, y causo que el sello de la corte de Pruebas del dicho Condado de Bernalillo, sea estampado en ésta, mi aprobacion, y decreto judicial. Dado en Bernalillo, hoy el dia tres de Febrero, A. D. 1862.

[SELLO.] (Firmado) JULIAN PEREA,
Juez de Pruebas.

Por el Juez de Pruebas.

NESTOR MONTOYA,
Diputado Escribano.

(Copy.)

Certifico que hoy 3 de Febrero de 1862, he enregistrado el antecedente testamento.

NESTOR MONTOYA,
Diputado Escribano de la Corte de Pruebas.

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

I, J. L. Perea, Jr., probate clerk in and for said county, in
107 said Territory, do hereby certify that the foregoing is a true copy of the records in my said office, as appears of record in Vol. A of Wills and Testaments, on folios 5 to 13.

Given under my hand and official seal this May 10th, 1884.

[SEAL.] J. L. PEREA, JR.,
Probate Clerk,
By C. F. PIERCE, *Deputy.*

(Endorsed:) 975. Bern. Co. Filed in my office this 30th day of May, 1884. Edmund H. Smith, clerk.

(EXHIBIT No. 2.)

(*Translation.*)

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

Know all by these presents that I, Maria Dolores Ledoux, a resident of La Cueva, county of Mora, and Territory of New Mexico, legitimate heir of the deceased Maria Apolonia Lucero y Sandoval, reposing entire confidence in the integrity of my husband, Guadalupe Gutierrez, by these presents I constitute and empower him as my sole and legal agent, in order that he may for me and in my name claim, collect, receive, and discharge all that may be necessary and required in the enforcement of my right, claim, interest, and privilege as heir of the estate, inheritances, and possessions of the said deceased Maria Apolonia Lucero y Sandoval.

To this end my husband, Guadalupe Gutierrez, shall have abso-

lute power, entire authority, and complete faculty irrevocable.
108 In testimony whereof I place my name and seal, in La Cueva, this day, July 11, A. D. 1879.

her
MA. DOLORES † LEDOUX. [SEAL.]
mark.

TERRITORY OF NEW MEXICO, *County of Mora:*

Before me, John Florence, clerk of the court of probate in and for the said county and Territory, personally appeared Maria Dolores Ledoux, to me personally known, and declared that she signed, sealed, and executed the foregoing for the intents and ends in it set forth.

In testimony whereof I place my name and official seal this day, July 11, A. D. 1879.

JOHN FLORENCE, *Clerk.*

Recorded this day, August 14, A. D. 1879.

MELCHIOR WERNER, *Clerk.*

(EXHIBIT "O.")

(*Translation.*)

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

Know all by these presents that we, José Manuel Gallegos, Francisco Tomas Cabeza de Baca, José Serafin Ramires, as principals, and Manuel Armijo, Nestor Montoya, Antonio Luna, Pedro Armijo, as sureties, are held and firmly bound to the Territory of New Mexico in the sum of fifty thousand dollars; to the payment of which we bind ourselves, well and faithfully, as much for ourselves as for our heirs, executors, and administrators.

In testimony whereof we place our hands and seals, in Bernalillo, this day, February 3, A. D. 1862.

The condition of the above obligation or bond is that
109 whereas Messrs. Manuel Gallegos, Francisco Tomas Cabeza de Baca, and José Serafin Ramires have been appointed legal administrators of all the property of the deceased, Don Antonio Sandoval, by the probate court of Bernalillo county: Now, if the said administrators account for, pay, and deliver all the money and property of the said deceased to the legal heirs of the said deceased and do all the other things required of them by the law for the faithful performance of their duties as such administrators, then this bond shall be null and of no value; on the contrary, it shall continue in all its force and effect.

JOSE M. GALLEGOS. [SEAL.]
TOMAS C. DE BACA. [SEAL.]
JOSE SERAFIN RAMIRES. [SEAL.]
NESTOR MONTOYA. [SEAL.]
ANTONIO LUNA. [SEAL.]

his
PEDRO † ARMIJO. [SEAL.]
mark.

MANUEL ARMIJO. [SEAL.]

I certify that this day, February 3, 1862, I recorded the foregoing bond.

NESTOR MONTOYA,
Deputy Clerk of the Probate Court.

(EXHIBIT "P.")

(*Translation.*)

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

Personally appeared before me, Pedro Lopez, one of the justices of the peace of precinct No. 7 of the county and Territory aforesaid Nestor Montoya, and under oath declared that he, without partiality and to the best of his ability, would appraise the property of
110 the deceased, Don Antonio Sandoval, as it might be brought under his sight and knowledge.

NESTOR MONTOYA.

Sworn and subscribed before me this day, February 5, A. D. 1862.

(Signed) PEDRO LOPEZ,
Justice of the Peace.

I certify this day, February 5, 1862, that I recorded the foregoing sworn declaration.

NESTOR MONTOYA,
Deputy Clerk of the Probate Court.

(EXHIBIT Q.)

(*Translation.*)

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

Whereas the probate court of the county of Bernalillo, in the Territory of New Mexio, has been informed that Don Antonio Sandoval, a resident of said county and Territory, died in the said county and Territory on the twenty-fifth day of January, of the year of our Lord one thousand eight hundred and sixty-two, having made his last will and testament on the 11th day of June, of the year 1860, which testament has been approved by the said court, leaving in the said county and Territory property and effects which may be lost or damaged, there being no administrator to take care of them; and whereas Messrs. José Manuel Gallegos, Francisco Tomas Cabeza de Baca and José Serafin Ramires have made application to the said probate court to obtain letters testamentary and of administration of the said property, and have made the necessary oath and have given the proper bonds for the faithful performance of their duties as such administrators: Therefore I, Julian Perea, probate judge in and for the county of Bernalillo, in the said
111 Territory, by virtue of the authority conferred upon me by the law and by these presents, I name and appoint the said

gentlemen, José Manuel Gallegos, a resident of the county of Santa Fé; Francisco Tomas Cabeza de Baca, a resident of the county of Santa Ana, and José Serafin Ramires, a resident of the county of Bernalillo, legal administrators of all the effects, property, money, and credits, rights and privileges, which at the time of his death belonged to the said deceased, Don Antonio Sandoval, it being understood that the said administrators shall give an account of them to this court each year until the final conclusion of their administration, and do all the other things relating to the said administration as required by law or by order of this court or that of any other court having jurisdiction in the matter.

In testimony whereof I place my official name and cause that the seal of the probate court of the said county be affixed to these letters testamentary and of administration, given in Bernalillo to-day, the third day of February, of the year of our Lord one thousand eight hundred and sixty-two.

(Signed) JULIAN PEREA,
Probate Judge.

I certify that to-day, the third of February, of the year of our Lord one thousand eight hundred and sixty-two, I recorded the foregoing letters of administration.

NESTOR MONTOYA,
Deputy Clerk of the Probate Court.

(EXHIBIT R.)

(*Translation.*)

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

112 Personally appeared before me, Julian Perea, probate judge of the county and Territory above mentioned, Facundo Pino, and under oath declared that, without partiality and to the best of his ability, he would appraise the property of the deceased, Don Antonio Sandoval, as it might be brought under his sight and knowledge.

FACUNDO PINO.

Sworn and subscribed before me this day, February 3, A. D. 1862.

(Signed) JULIAN PEREA,
Probate Judge.

I certify this day, February 3, A. D. 1862, that I recorded the foregoing sworn declaration.

NESTOR MONTOYA,
Deputy Clerk of the Probate Court.

(EXHIBIT S.)

(*Translation.*)

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

Personally appeared before me, Julian Perea, probate judge of the county and Territory aforesaid, Messrs. José Manuel Gallegos, Francisco Tomas Cabeza de Baca and José Serafin Ramires, and under oath they declared that they will well and faithfully administer the estate of the deceased, Don Antonio Sandoval, and that they will make an exact and complete inventory of all the effects and property of the said deceased, and that they will deliver all the effects of said (Mora) to the legal heirs of said deceased, and that they will fulfill and execute the last testamentary will of said deceased, and that they will do all other things relating to the said administration, as required by law or by order of this court, or any other
113 court having jurisdiction, with due diligence.

JOSE MANUEL GALLEGOS.
TOMAS C. DE BACA.
JOSE SERAFIN RAMIRES.

Sworn to and subscribed before me this day, February 3, A. D. 1862.

JULIAN PEREA,
Probate Judge.

I certify that I have recorded the foregoing affidavit this day, February 3d, 1862.

NESTOR MONTOYA,
Deputy Clerk of the Probate Court.

(EXHIBIT V.)

(*Translation.*)

Inventory of Guadalupe Sandoval, who was constituted heir by the deceased, Antonio Sandoval y Tofolla, and there should be for all her rights in the estate of the said deceased the sum of 43,516 dollars 34 cents and ¼ of a cent.

And for its payment the following property is adjudged to her:

First, in Real Property.

Nos.			
1	Two thousand dollars in the place Agua Negra	2,000	
2	One hundred dollars in the place Ojo de Meganos	100	
3	Four hundred and forty dollars forty-four cents in the place San Antonio de Corrales	400	40
4	One thousand six hundred dollars in the place Barelas	1,600	

5	Twenty-four dollars in several pieces of land in Alameda	24	
114 6	One hundred and ten dollars forty cents in several pieces of land in Bernalillo	110	40
7	One thousand three hundred and thirty-three dollars and thirty-three cents one-eighth, the third part of the value of the house of the deceased at Barelas	1,333	33⅓

The Money Which is Due the Estate.

8	Five thousand four hundred dollars in debts of the Mexican Government	5,400	
9	Eight thousand three hundred and eight dollars and sixty-five cents in a debt against Juan de Dios Marques, of Durango	8,308	65
10	Two thousand dollars against Juan Nepomuceno Vequide, of the State of Chihuahua	2,000	
11	One thousand five hundred and eighty dollars against Francisco Chaves y Perea	1,580	
12	Nine hundred and thirty-three dollars and twenty cents in Juan Houghton	933	20
13	Three hundred and eighteen dollars and forty-seven and one-eighth cents in Felix Benabides	318	47⅛
		25,048	45⅛
	Amount brought forward	25,048	45⅛
15	Six hundred and eighty dollars abroad, Saco Schinger	680	
16	Five hundred and twenty-six dollars and sixty cents in José Manuel Cordoba	526	60
115 17	Five hundred and twenty-six dollars in Manuel Barela	526	
18	Three hundred and four dollars and eighty cents in Lorenzo Marquez	304	80
19	Two hundred and sixty-five dollars in José Manuel Marquez	265	
20	Two hundred and eighty-four dollars and forty cents in Clemente Sarracino	284	40
21	Four hundred and twenty-seven dollars and twenty cents in Antonio Maria Sanchez, of Santa Fé	427	20
22	Four hundred and eighty dollars in the estate of the deceased José Maria Miera y Pino	480	
23	Four hundred and ninety-one dollars and forty cents in Ma	491	40
24	Two hundred and twenty-six dollars and eighty cents in Pedro Ronquillo	226	80
25	Two hundred and twenty dollars in Manuel Doroteo Pino	220	

26	Four hundred dollars in Miguel Pino, Santa Fé. I have received payment	400	
27	Seven hundred and fifty dollars in Antonio José Rivera and his wife, Santa Fé	750	
28	Four hundred and twenty dollars in Santiago Gonzales	420	
29	Three hundred and fifteen dollars in José Griego	315	
	30 Two hundred dollars in Antonio Roble	200	
116	31 Seven dollars and eighteen cents in Pedro Cleto Lopez	7	18
32	Seventy-eight dollars, Henry Henry	78	
33	Fifty dollars in Manual Sabedra	50	
34	Fifty dollars in Francisco Armijo	50	
35	Twenty dollars in Rafaela Ruiz	20	
36	Six dollars in José Dolores Baca	6	
37	Twenty-eight dollars and sixty-seven cents in Pablo Sisnero	28	67
		31,805	50⅔
	Amount brought forward	31,805	50⅔
38	One hundred dollars in Julian Guaken	100	
39	Fifteen dollars and twenty cents in Manuel Antonio Aragon	15	20
40	Twelve dollars in Maria Gallego de Barelas	20	
41	Ninety-nine dollars and twenty cents, Juan Chavez	99	20
42	Thirty-nine dollars and twenty cents in José Rafael Montoya	39	20
43	Six hundred and eighty dollars in Juan Archiqeque. Juan Archiqeque paid	680	
44	Ten dollars in Rumaldo Archileque	10	
45	Twenty-two dollars in Miguel Lucero	22	
46	Twenty dollars in Miguel Suna	20	
47	Thirty dollars in Lucaz Guruli	30	
48	Forty dollars in José Manuel Sabedra	40	
49	Twenty dollars in Roman Baca	20	
	50 Ninety-nine dollars in Ambrosio Chavez	99	
117	51 Forty-one dollars and forty cents in Antonio Ramon Jaramillo	41	40
52	Two hundred and sixty-four dollars, Manuelito Chavez, of Cebolleta	264	
53	One hundred and twenty-one dollars and seventy cents in Pablo Pino	121	70
54	Twenty-seven dollars and twelve cents in Juan Garcia	27	12
55	Two dollars and eighty cents in Pedro Baca	2	80
56	Twenty dollars in Antonio José Molina	20	
57	Six dollars and eighty cents in Antonio Esperillon Sabedra	6	80

58	Six dollars and eighty cents in Manuel Sabedra, of Sebolleta	6	80
59	Fifteen dollars and sixty cents in José Dario Sabedra	15	60
60	Three dollars and twenty cents, Juan Alfaro	3	20
		33,509	52½
	Amount brought forward	33,509	52½
61	Sixty dollars in Blas Lucero	60	
62	One hundred and sixty-six dollars and sixty cents in Tomas del Balle	166	60
63	Eleven dollars in Julian Teriorio	11	
64	Twenty dollars in Juan José Lucero	20	
65	Nineteen dollars thirty-seven and one-quarter cents in Marcas Sanches Vergara	19	37¼
66	Four dollars and eighty cents in Maria de Jesus Lucero	4	80
118 67	Eight dollars in Juan José Gonzalez	8	
68	Twenty dollars in José Desiderio Lucero	20	
69	Sixty dollars in José Gonzalez and his wife	60	
70	Eighty-nine dollars and eighty cents, Diego Gomez	89	80
71	One thousand and forty dollars in Gervacio Nolan	1,040	
72	Five hundred and seventy-seven dollars in Juan Ortega	577	
73	Forty-one dollars and twenty cents in Ramon Ortega	41	20
74	Eleven dollars in José Maria Benabides	11	
75	Sixty dollars in Tomas Lalanda	60	
76	Two hundred and fifty-three dollars and forty cents in Francisco Esquibel de Mora	253	40
77	Sixteen dollars in Buenaventura Lobato	16	
78	Three dollars and fifty cents in José Francisco Fernandez	3	50
79	Fifty-four dollars and fifty-five cents in Juan Antonio Sarracino	54	55
80	Thirty-four dollars in José Rafael Garcia	34	
81	Sixty dollars in José Antonio Chavez	60	
82	Twelve dollars in José Marcos Lobato	12	
83	Thirty dollars and twenty cents in Maria de la Luz Chavez	30	20
		36,161	95½
119	Amount brought forward	36,161	95½
84	Sixty dollars in Salvada Jaramillo	60	
85	Forty dollars in Guadalupe Jaramillo	40	
86	Forty dollars in Leodoro Armijo	40	
87	Sixty-one dollars and sixty cents in Mariano Montoya	61	60

88	Twenty-four dollars in Francisco Salar	24	
89	Forty dollars in the estate of the deceased, Diego Armijo	40	
90	Eighty-seven dollars and eighty cents in José Salazar	87	80
91	Twenty-seven dollars and eighty cents in Tomas Baca, of Belen	27	80
92	Forty dollars in Monica Pino	40	
93	Twenty dollars in Leodoro Armijo	20	
94	Thirty-one dollars and forty cents in Antonio Maria Lopez	31	40
95	Eighteen dollars and sixty cents in Desiderio Griego	18	60
96	One hundred and seventy-nine dollars and twenty cents in Pablo Griego	179	20
97	Thirty-eight dollars and sixty cents in Miguel Antonio Lobato	38	60
98	Sixty-four dollars in Torribio Rea	64	
99	Thirty dollars in Damasio Martin y Ortega	30	
100	Ten dollars in Estefana Raibal	10	
101	Twenty dollars in Nicolas Quintana	20	
102	Seventy dollars in Daniel Sandoval	70	
103	Twenty dollars in Luis Sanchez	20	
104	Twenty dollars in Felipe Aragon	20	
	105 Thirty dollars in Miguel Cena y Romero	30	
120	106 Sixteen dollars in Juan Pablo Martin	16	
	107 Eleven dollars and sixty-five and one-eighth cents in Antonio Sanchez	11	65⅛
		37,162	60⅛
	Amount brought forward	37,162	60⅛
108	Four dollars in Valentin Samora	4	
109	Seven dollars and ninety cents in Manuel Sabedra	7	90
110	One hundred and sixteen dollars and twenty cents, Jesus Carderas	116	20
111	Sixty-one dollars and seventy cents in Francisco Ruiz	61	60
113	Six dollars and twenty-five cents in José Antonio Montoya	6	25
113	Eight dollars in Manuel Antonio Aragon	8	
114	Twenty-five dollars and twenty cents in José Antonio Baca	25	20
115	One hundred and seven dollars and sixty cents in Juan José Garcia	107	60
116	Fifty-one dollars in Juaquin de Luna	51	
117	One hundred and fifty-five dollars and forty cents in Rafael Chavez	155	40
118	Thirty-five dollars and forty cents in Juan Gutierrez	35	40

119	One hundred and forty-three dollars and forty cents in Diego Martin	143	40
120	Five dollars and ten cents in Santiago Nevarez	5	10
121	Eleven dollars and fifty cents in Juan Albino Gonzales	11	50
122 121	One hundred and ten dollars and twenty cents in Juan Nepomuceno Montoya	110	20
123	Fifty dollars and twenty cents in Juan Montoya, of Corrales	50	20
124	Fifty-one dollars and twenty cents in Juan Garcia, Casa Colorado	51	20
125	Seventy-two dollars and twenty cents in Fernando Gutiarrez	72	20
		38,184	95½
	Amount brought forward	38,184	95½
126	Twenty dollars in Eulogio Sabedra	20	
127	Ten dollars in Luiz Sanchez	10	
128	Nine dollars in Rumaldo Gallego	9	
129	Thirty-one dollars and forty cents in Antonio Maria Lopez	31	40
140	Four dollars in Juan de la Cruz Gonzales	4	
141	Twelve dollars in Juan Pablo Mestas	12	
142	Fourteen dollars in Roque Chavez	14	
143	One hundred and twelve dollars and fifty cents in Juan de Jesus Baldez	112	50

Live Stock.

144	Blas Chavez on twenty-eight head of neat cattle on shares, there belong to each heir ninety-nine dollars	99	
145	José Maria and Leonardo Tofollas on four thousand one hundred sheep on shares, there belong to each heir, appraising them at one dollar	820	
146 122	José Antonio Chavez, of Padillas, on one thousand two hundred and seventy-two sheep, on shares, each head valued at twelve reals, there belong to each heir three hundred and eighty-one dollars and sixty cents	381	60
147	Nepomaceno Carabajal on one thousand and thirteen sheep on shares, valued at one dollar each, there belong to each heir two hundred and two dollars and sixty cents	202	60
148	In Jesus Miera five hundred sheep, at twelve reals per head	750	
149	In Juan Domingo Montoya forty sheep, at one dollar	40	

150	In Juan Miera four hundred and eighty sheep on shares, at twelve reals per head	720	
151	In Ambrosio Gonzales three hundred sheep on shares, at twelve reals per head	450	
		41,861	05⅝
	Amount brought forward	41,861	05⅝
152	In Juan Griego, of Chilili, one hundred and sixty-eight goats, at one dollar per head, there belong to each heir on eight hundred and forty goats	162	
153	In Cleto Lopez eighty goats on shares, at one dollar, the total number of which is four hundred goats	80	
154	In neat cattle received for the share	170	
155	For the fifth part of two mules and one horse owed for by José Manuel Sanedra	22	
123 156	The fifth part of one horse owed for by Antonio José Martin, valued at $20	4	
158	The fifth part of two oxen loaned, owed for by Juan Chaves, valued at thirty dollars	6	
159	The fifth part of two oxen lent to Miguel Zamora, valued at thirty dollars	6	
160	The fifth part of two oxen lent to Gertrude Sanches, valued at thirty dollars	6	
161	Thirty-eight sacks of corn, at two dollars	76	
162	One stock jack (burro manadero)	100	
163	One jenny in twenty dollars	20	
164	One bay mule in thirty dollars	30	
165	Two hundred sheep, at one dollar	200	
166	Twenty-nine sheep on shares, at one dollar and a half	43	
166	One hundred and fifty dollars in Manuel Garcia	150	
167	Twenty-four —, value of wheat received in the house of Pedro Armijo	24	
168	Two round mirrors, valued at 20 dollars	40	
169	One do., oblong, valued at 25 dollars	25	
	Eight dollars and thirty cents, value of the 3d part of another do., do.	8	30
	Eight dollars and thirty-three cents, value of the 3d part of a copper kettle	8	33
		43,043	38⅝
	Amount brought forward	43,042	38⅝
124	Three dollars and thirty-three cents for a share in a stove	3	33
	Six dollars and eighty cents for a share in a bed	6	80
	Six dollars for a share in two head of neat cattle which were sold	6	

An old wagon in thirty dollars	30	
In furniture, goods, and other different articles which were divided and the share received, the value of 334 dollars 81 cents and one-quarter	334	81¼
Three chairs in 3 dollars	3	
Ninety dollars one and a half cents in ornaments, furniture and ornaments of the chapel which were received in the partition	90	01½
Total amount received	43,516	34

The undersigned, administrators and executors of the estate of the property of the deceased, Antonio Sandoval, certify that the foregoing inventory is a true adjudication made in favor of Guadalupe Sandoval, as heir constituted by the said deceased, Antonio Sandoval, which accrues to her for all her rights to the real, personal, and self-moving property, debts, and other things which have come under our notice and knowledge and appear in favor of said estate; wherefore we, the said administrators and executors, declare that the said Guadalupe Sandoval, she, her heirs, successors, administrators, and assigns, have the right to receive, collect, and take possession of the said property to them adjudicated as they will; for which we give them the present, which we sign and seal in Peña Blanca this the twenty-fourth day of May, of the year of our Lord one
125 thousand eight hundred and sixty-two.

August 23, 1865.

JOSE SERAFIN RAMIRES, [SEAL.]
TOMAS C. DE BACA, [SEAL.]
JOSE M. GALLEGOS, [SEAL.]
Administrators and Executors.

The item relating to the estate of the deceased, Antonio Sandoval, which finally appears as having been distributed (between one of his heirs), shall be made to appear in the inventory.

Albuquerque, August 23, 1865.

J. M. GALLEGOS.

There is charged to the credit of Guadalupe Sandoval the following: In Juan Antonio Chaves two hundred and forty-five goats, at one dollar per head, $245.00.

(EXHIBIT "W.") Testament.

(*Translation.*)

TERRITORY OF MEXICO, *County of Bernalillo:*

In the name of God Almighty, amen:

I, Antonio Sandoval y Tafoya, a resident of Los Varelas, and of the Territory and county aforesaid, legitimate son and of legitimate matrimony of Don José Sandoval and Doña Apolonia Tafoya, now

deceased, natives of the same Territory aforesaid, being through Divine Providence sound and well and in my entire and full mind, memory, and entire natural understanding, believing and confessing, as I firmly do believe and confess, in the Most High and infallible mystery of the Most Holy Trinity, Father, Son, and Holy Ghost, three persons, who, although really distinct, have the same attributes, and are only one true God, one essence and substance, and in all the mysteries and sacraments which our holy mother church
126 (C. A. R.) holds, believes, and confesses, in which true faith and belief I have lived and die as a faithful Catholic Christian, taking for my intercessor and protectress the ever Virgin Mary and Immaculate Queen of the Angels, Mother of God, and our Lady; my holy guardian angel; those (saints) of my name and devotion, and the rest of the celestial court, in order that they may pray to our Lord Jesus Christ, that through the infinite merits of His most precious life, passion, and death He may pardon all my faults and sins and bear my soul to rest and to enjoy His most beautiful presence; fearful of death, which is natural and inevitable to all human beings, and the uncertainty of its coming, in order to be prepared as to testamentary dispositions when the time shall come, since I find myself well advanced in life for my age.

Wherefore, with mature reflection, to-day, in my full judgment, mind, and sound memory, I make, order, publish, and declare this my last will and testament, and to avoid with clearness the doubts and questions which might arise after my death, and in order not to have at that hour any mental care which might interfere with my praying to God with due earnestness for the forgiveness, which I hope for, of my sins—

I execute, make, and order my will in the following form:

First. I commend my soul to God, our Lord, Who from nothing created it, and my body to the earth, of which it was made, which, being made a corpse, I direct that it be shrouded in the habit of our seraphic father, Saint Francis, and buried in the parochial church of which I may be a parishioner at the time of my death. It is my will that the priests who can be assembled within twenty-four hours after my death shall assist at my funeral. Item: I direct that on the day following my death and at the hour of my burial
127 there shall be celebrated for my soul a high mass, with deacon, sub-deacon, fast and responses, and the body of priests assembled shall assist at the celebration of the same, for all of which the usual stipend shall be paid. Item: I direct that on the day after my burial a novenary of high masses, without deacons, shall be begun, the honors and the anniversary services to be the most classic that the circumstances will permit. Item: I direct that there shall be celebrated five hundred low masses for my soul, those of my parents and grand parents, and the others of my family, paying for each mass the stipend which it is the custom to pay, from which the fourth part belonging to the parish being deducted, those remaining shall be celebrated in the churches and at the altars which my executors may designate. Item: I direct that for one time only, for the preservation of the holy places and the Holy Land, the ransom

of Christian captives and others in bondage, twenty reals for one time only. Item: I bequeath to my sisters who may survive my death, and who shall have come to my assistance at its time, my dwelling-house, with all the utensils and household articles belonging to it and actually in it at the time of my death, and I beg that they will commend me to God. Item: I declare that I have four servants who live with me, and they are Francisca, Antonia, Daniel, and José, to whom I bequeath, and I order that there shall be given to each one, two cows or their value, a horse or a mare, and in addition two hundred varas of land in Atrisco, which shall be divided among them in equal parts, and I ask them to commend me to God. Item: I direct that to Francisca, in addition to the share coming to her under the preceding clause, I bequeath to her the bed which I use, with the sheets belonging to it, and I beg that she will pray
128 to God for my soul. Item: I direct that the persons named in the two foregoing clauses may enjoy the benefit of them, they and their descendants who may be alive after my death. Item: I direct that all the men servants whom I have in my employ, be the amount which they may owe me at the time of my death what it may, shall be released, and I ask them to pray to God for me. Item: I declare that I was legitimately married, "*in facie ecclesia*," to Doña Ursula Chaves, now deceased, in which marriage we did not have nor did we procreate any children. Item: I direct that two documents, dated the first in the year 1830, on the nineteenth day of July, in the town of Padillas, and the second on the sixth day of February, 1835, in Albuquerque, the first authenticated by the judge, Don Lorenzo Abeyta, and the second by Don Julian Tenorio, each document duly witnessed, and both relating to the naming as sole heir the one who should survive of us two, I and my wife, Doña Ursula Chaves, to the share which might legitimately belong to the other, principal and increase, for the reason that neither I nor my said wife has any heir to whom we are required by law to leave our property, and we naturally agreed the one with the other, according to our free will; and in this clause I order and direct my executors named in this my will that, if it should be necessary at any time during their charge, they shall be attached to these presents in order to clear up any doubt that might exist because of the constitution which I make to-day in this my last will. Item: I declare that two years ago, a little more or less, my house was opened and robbed at a late hour of the night by a band of robbers, and these stole money and jewels and burned and stole important papers and documents. I direct that if any persons should come to negotiate the said documents they shall not be recognized, unless they should
129 be legally transferred according to law, neither in court nor out of court.

Item: I declare that the deceased, Don Francisco Sarrasino, had in his power, as my agent and attorney, some papers, books, and documents of importance, and that he died before delivering the same to me, and that after his death some of them were delivered to me by his administrator, Don Juan Antonio Sarrasino, the greater

part of them being wanting, among them a document for more than fifty thousand dollars.

Another of Don Juan Nepomuceno Orquide, of the State of Chihuahua, and the first of Don Juan de Dios Marques, of the State of Durango, and fearing that persons who have no right to them may fraudulently lay claim to them, I direct that they may be proceeded with in accordance with the foregoing clause.

Item: I direct that at the time of my death there shall be distributed among the poor one thousand dollars to widows, orphans, and cripples, leaving to the judgment and conscience of my executors the consideration of the need of each one, and the amount to be given to each to be graduated according to the circumstances, and it shall be in articles for their maintenance and clothing at the prices at which the articles shall be purchased shall be the most equitable, and I beg that they will pray to God for me.

Item: I direct that all debts which may be due me at the time of my death shall be collected, but with the condition that no poor person shall be deprived of his house and the land necessary for the maintenance of his family.

Item: I direct that from the heirs of the deceased, Don Francisco Sarracino (for that which he was indebted to me), from those of the deceased, Don Juan Antonio Rael, and from Don Serafin
130 Ramires, or his heirs, nothing shall be collected of that which they may owe me, since it is thus my will to do, and I beg that they will pray to God for me.

Item: I declare the heirs are not exempt for what they owe.

Item: If among my papers or in the hands of my confessor there shall be found a memorandum, signed by my hand or written by me, although it may not be signed, containing directions, declarations, or other things concerning my last will, I direct that it shall be held and esteemed as a part of this testament; that it shall be filed with it in the public records after my death, and that its text be observed integrally and inviolably, since such is my will, but, not being written or signed by me, it shall not be valid in court or out of court.

Item: I declare I have a tolerable fortune, composed of several thousand sheep, cows, mules, horses, lands, houses in different parts of the Territory, debts, documents, acknowledgments of money at interest, and other indebtedness, cash-books and memorandum books, debts due me by several persons of the Republic of Mexico, and obligations which prove the debt owed me by the Government of Mexico for loans which I made to it in the years 1844 and 1845, and in order to faithfully carry out all that this my testament contains and that which the memorandum may contain (in case e should be left) I appoint for my executors and administrators Don Serafin Ramires, Don Tomas Cabeza de Baca, and Don José Manuel Gallegos, and each one *in solidum*, and I confer upon them full power and authority in order that after my death they may determine and execute and take possession of my estate and act by themselves extrajudicially, without the intervention of a judge, may pay my bequests ordered, and settle
131 and pay all according to the tenor of this my last will; and

if any person should legally prove a debt against me I order that they shall pay it, which charge shall endure for one legal year, and the additional time that they may need I extend it for them. And after having settled and paid all, and, inasmuch as I am without legitimate descendants and have no heirs to whom I am required to leave my property by the general and private laws of this Territory, using the power which they give me, I constitute as my sole and universal heirs to the remainder of my property, rights, and shares my sisters, who are Josepha, Manuela, Juana, Catarina, and Guadalupe, and their children and successors; and by the present I revoke and annul all the testaments and other testamentary dispositions which before now I may have made in writing, by word, or in any other form, in order that none be valid or have credit, either judicially or extrajudicially, except this testament and the said memorandum which I desire and direct may be esteemed and held as my last deliberate will, in the way and form that may be most favorable under the law (*prout magis per jus licet*), since it is authentically set forth and published by me, Antonio Sandoval y Tafoya, in the town of Alameda.

In testimony whereof I place my hand and seal this day, the eleventh day of June, in the year of our Lord one thousand eight hundred and sixty.

ANTONIO SANDOVAL.

Certificate.

The foregoing writing was dictated and signed by the said Antonio Sandoval y Tafoya in our presence, and understood by him and each one of us. In his entire judgment, mind, and sound memory he declared the said writing thus signed to be his last will and
132 testament, and we, at the solicitation of the testator, witness in his presence and have signed as witnesses.

(Signed) ANTONIO LERMA.
JOSE DEL VALLE.
LORENZO MONTANO.
RAFAEL MIERA.
JOSE MIGUEL LUCERO.

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

Whereas by the examination of the witnesses who were present at the delivery and execution of the foregoing testament and last will of the deceased, Don Antonio Sandoval, it has been evidently proved that the said deceased, at the delivery and execution of his said testament and last will, was in his sound mind and in entire liberty, and that the foregoing testament and last will is the same executed by the said deceased:

Wherefore I, Julian Perea, probate judge in and for the county of Bernalillo, in the Territory of New Mexico, in virtue of the authority conferred upon me by the law, I approve, publish, and declare the foregoing testament and last will the legal and true testament of

the deceased, Don Antonio Sandoval, and I order that it be executed by his executors and administraters in all its parts.

In testimony whereof I sign my name and cause that the seal of the probate court of the said county of Bernalillo be affixed to this my approval and judicial decree.

Given in Bernalillo this the third day of February, A. D. 1862.

[SEAL.] (Signed) JULIAN PEREA,
Probate Judge.

For the probate judge:

NESTOR MONTOYA,
Deputy Clerk.

133 (Copy.)

I certify that to-day, February 3, 1862, I recorded the foregoing testament.

NESTOR MONTOYA,
Deputy Clerk of the Probate Court.

(DEFENDANTS' EXHIBIT "X.")

UNITED STATES OF AMERICA,
Territory of Mexico, County of Bernalillo:

Know all men by these presents that I, by my attorney, Guadalupe Gutierrez, duly authorized to execute deed for me by power of attorney, dated January 21st, 1880, Maria Quirina Ledoux, legitimate heir of Maria Apolonia Lucero y Sandoval, deceased, for and in consideration of the sum of fifty dollars to Guadalupe Gutierrez, as attorney, in hand paid, the receipt whereof is hereby acknowledged, has this day bargained, sold, and conveyed, and by these presents doth bargain, sell, and convey, to Charles W. Lewis, his heirs and assigns, forever, a certain piece or parcel of land lying and situate in the sitio of Barelas and county of Bernalillo, and known as the Lagunitas, measuring from north to south hundred varas, and bounded on the north by the lands of Charles W. Lewis; on the south by the lands of Ma. Apolonia Lucero y Sandoval; on the east by the foothills; on the west by the Rio Grande del Norte:

To have and to hold the said piece or parcel of land to the said Charles W. Lewis, his heirs and assigns, forever, in as ample and perfect a manner as the said heir of Maria Apolonia Lucero y Sandoval had and held just before the execution of this conveyance;

and I, Guadalupe Gutierrez, as the attorney-in-fact of the heir,
134 Maria Quirina Ledoux, do covenant and agree for the said Maria Quirina Ledoux, her heirs and assigns, forever, with Charles W. Lewis, his heirs and assigns, as follows: That the said Guadalupe Gutierrez, as attorney of Maria Quirina Ledoux, as shown by power of attorney dated January 21st, 1880, and recorded in Book "J," pages 52 and 53, has full authority to sell and dispose of said piece or parcel of land, and that the said Charles W. Lewis, his heirs and assigns, shall quietly enjoy the occupancy of said piece or

parcel of land free from all claims or demands of the said Maria Quirina Ledoux, his administrator, executor, and assigns.

That the said Ma. Quirina Ledoux will defend and protect the said Charles W. Lewis, his heirs and assigns, to said piece or parcel of land against all claims and demands and against persons claiming to be heirs of said Ma. Apolonia Lucero y Sandoval.

Witness my hand and seal, at Albuquerque, N. M., this 19th day of February, A. D. 1880.

his
GUADALUPE † GUTIERREZ. [SEAL.]
mark.
Attorney for Maria Quirina Ledoux.

Witnesses:
MELCHIOR WERNER.
THOMAS WERNER.

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

This day personally appeared before me, Melchior Werner, clerk of the probate court in and for said county and Territory, the above-named Guadalupe Gutierrez, personally known to me as the above-named attorney of Maria Quirina Ledoux, and acknowledged the execution of the above deed to be his voluntary act and deed for the purposes therein mentioned.

135 Witness my hand and official seal, at Albuquerque, this 19th day of February, A. D. 1880.

[Seal Probate Court.]

MELCHIOR WERNER,
Probate Clerk.

(Endorsed.)

Filed in my office for record this 19th day of February, A. D. 1880, at 12 o'clock m., and recorded in Book "J," pages 53, 54, and 55.

Witness my hand and official seal this 19th day of February, A. D. 1880.

[Seal Probate Court.]

MELCHIOR WERNER,
Probate Clerk and ex Officio Recorder.

(EXHIBIT, DEFENDANTS', Y.)

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

This indenture, made this 23d day of January, in the year of our Lord one thousand eight hundred and eighty-two, between Jesus Baca and Candalaria Aragon, his wife, of Barelas, in the county of Bernalillo and Territory of New Mexico, parties of the first part, and Charles W. Lewis, of Albuquerque, in the county of Bernalillo and Territory of New Mexico, party of the second part, witnesseth:

That the said parties of the first part, in consideration of the sum of two hundred (200.00) dollars, lawful money of the United States,

to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the second part, his executors and administrators, forever released and discharged from the same, by these presents have granted, bargained, sold,
136 aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey, and confirm, unto the said party of the second part, and to his heirs and assigns, forever all that certain tract, piece, parcel, or lot of land situate, lying, and being in Barelas, in the county of Bernalillo and Territory of New Mexico, known, bounded, and described as follows: On the north by lands of Manuel Apodaca, on the south by lands of the said party of the second part, on the east by the top of the hills, and on the west by the Rio Grande del Norte; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, dower or right of dower, property, possession, claim, and demand whatsoever, both in law and equity, of the said parties of the first part of, in, and to the above-granted premises and every part and parcel thereof, with the appurtenances:

To have and to hold the above mentioned and described premises, with the appurtenances and every part thereof, to the said party of the second part, his heirs and assigns, forever.

And the said parties of the first part and their heirs, the above-described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, with the said party of the second part, his heirs and assigns, against the said parties of the first — and their heirs, and against all and every person and persons whomsoever lawfully claiming or to claim the same or any part thereof shall and will warrant and by these presents forever defend.

In witness whereof the said parties of the first part have
137 hereunto set their hands and seals this 23d day of January, A. D. 1882.

JESUS BACA. [SEAL.]

her
CANDELARIA † ARAGON. [SEAL.]
mark.

Witnesses:
THOMAS WERNER.
CHARLES F. PIERCE.

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

On this 23d day of January, A. D. 1882, before me, Melchior Werner, probate clerk, personally came Jesus Baca and Candelaria Aragon, his wife, to me personally known to be the same persons whose names are signed to and who are parties to the foregoing deed of conveyance, and acknowledged that they signed, sealed, and ex-

ecuted the same, freely and voluntarily, for the purposes therein mentioned; and the said Candelaria Aragon, being by me first informed of the contents of said deed of conveyance, confessed, on an examination separate and apart from her said husband, that she signed, sealed, and executed the same, freely and voluntarily, for the purposes therein mentioned, without any compulsion or the illicit influence of her said husband.

Given under my hand and official seal this 23d day of January, A. D. 1882.

[Seal Probate Court.]

MELCHIOR WERNER,
Probate Clerk, Bernalillo County.

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

138 I, Melchior Werner, clerk of the probate court and *ex officio* recorder in and for the county of Bernalillo, in said Territory of New Mexico, certify that the foregoing deed of conveyance was filed in my office for record by Charles W. Lewis on the 23d day of January, A. D. 1882, at 12 o'clock m., and that the same is duly recorded in Book "O" of the recorder of deeds of said county of Bernalillo on pages 159 to 161.

In witness whereof I have hereunto set my hand and official seal this 27th day of January, A. D. 1882.

[Seal Probate Court.]

MELCHIOR WERNER,
Clerk and ex Officio Recorder, Bernalillo County.

(DEFENDANTS' EXHIBIT Z.)

TERRITORIO DE N. MEXICO, *Condado de Bernalillo:*

Por estas presentes day poder y facultad al Señor Guadalupe Gutierrez, para que en mi nombre venda traspase y enagene, en la persona ó personas, que mejor le paresca cualesquiera propriedad, riaz ó personal que tenga ó pueda tener, como heredera legitima por mi madre, Ma. Apolonia Lucero, la cual fue del finada Antonio Sandoval, la cual propriedad es á mi desconocida y se halla en el rio abajo.

En cuyo testimonio pongo mi nombre hoy 21 de Enero, A. D. 1880.

su
MA. QUIRINA † LEDOUX.
marca.

Testigo:
JUAN FRORENCE.

Certifico que Ma. Quirina Ledoux en presencir me entrego el presente poder a Guadalupe Gutierres y en fe de lo cual pongo
139 mi firma oficial hoy 21 de Enero, año de 1880.

CRESENCIO GONZALES,
Juez de Paz del Precinto No. 5, del Condado de Mora.

Filed in my office for record this 19th day of February, A. D. 1880.

MELCHIOR WERNER,
Probate Clerk and ex Officio Recorder.

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

I, J. L. Perea, Jr., probate clerk and *ex officio* recorder in and for the county and Territory aforesaid, do hereby certify that the foregoing is a true and complete copy of the record as it appears in my office.

Given under my hand and official seal this 28th day of May, 1884.

[SEAL.] J. L. PEREA, JR.,
Probate Clerk and ex Officio Recorder.
By L. T. ROBERTS, JR., *Deputy.*

(Endorsed:) 975. Bern. Co. Filed in my office this 30th day of May, 1884. Edmund H. Smith, clerk.

(EXHIBIT "Z.")

(*Translation.*)

TERRITORY OF NEW MEXICO, *County of Mora:*

By these presents I give power and faculty to Don Guadalupe Gutierrez, in order that he may in my name sell, transfer, and alienate to the person or persons, according to the best of his judg-
140 ment, any property, real or personal, which I have or may have as legal heir of my mother, Maria Apolonia Lucero, which property belonged to the deceased, Antonio Sandoval, which property is to me unknown, and is down the river.

In testimony whereof I sign my name this day, January 21, A. D. 1880.

his
MARIA QUIRINA † LEDOUX.
mark.

Witness:
JUAN FLORENCE.

I certify that Maria Quirina Ledoux, in presence, delivered to me the present power to Guadalupe Gutieras, and in testimony whereof I place my official signature this day of January 21, 1880.

CRESENCIO GONZALES,
Justice of the Peace of Precinct No. 5 of the County of Mora.

This being all the evidence, oral and written, offered and read and used upon said trial in said cause by either party, the court thereupon proceeded to charge and instruct the jury as shown and stated in the foregoing bill of exceptions, and the objections and exceptions to the ruling of the court taken at the time thereof; whereupon the jury, under the instructions of the court, returned

into court a verdict for the plaintiff as stated and directed by the court, as stated in this bill of exceptions; to all of which the defendant, at the times thereof, objected and then and there duly excepted.

(*Verdict.*)

"The jury, having now heard all the evidence, say, by direction of the court, that they find for the said plaintiff in the sum of five thousand three hundred and thirty-three dollars and thirty-three and one-third cents ($5,333.33⅓)."

141 Whereupon, afterwards, on the 2d day of June, 1884, being a day in and of the term of said court, the defendants then and there moved the court for a new trial in said cause and in arrest of the judgment, and filed grounds in support thereof in the words and figures following, to wit:

Motion for New Trial.

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

In the District Court for the Second Judicial District of the Territory of New Mexico, Sitting in and for the County of Bernalillo for the Trial of Causes Arising under the Laws of the Territory, at the May Term, A. D. 1884.

WALLACE DOUGLASS, Plaintiff,

against

CHARLES W. LEWIS and his wife, JESSIE A. LEWIS, Defendants.

Covenant.

And now come the defendants, Charles W. Lewis and Jessie A. Lewis, his wife, by their attorneys, Stearns & Douglas and S. M. Barnes, and move the court to grant them a new trial in this case and set aside the verdict of the jury and judgment rendered herein against them in this action, without the payment of costs, on the following grounds and for the following reasons, to wit:

First. The court erred, to the prejudice of these defendants upon said trial, in permitting the plaintiff to read in evidence the plat and report of the surveyor general of New Mexico, and filed in the register's office of the United States, within the Territory of New Mexico, and produced by Max Frost, register, and in permitting the said Frost to testify in reference to the said plat and report, and in reference to the lands in controversy in this case, because said plat and report and the evidence of said Frost was incompetent,
142 irrelevant, and illegal. The court also erred in not sustaining the motion of these defendants pending said trial to exclude from the consideration of the court and jury said plat and report and the evidence of said Frost.

Secondly. The court erred in rejecting and excluding from the jury the testimony of defendants' witnesses, Charles W. Lewis, Jesus

Baca, Teodoro Lopez, José Lueros, Juan Armijo, and Antonacio Montoya, offered upon said trial to prove possession of these defendants and those under whom they claim the land in contest in this case, and the court also erred in rejecting and excluding upon said trial from the consideration of said court and jury all evidence offered by them showing and tending to show that Antonio Sandoval, deceased, held, possessed, and owned the land in contest under a grant and title to said land under the Mexican Government or Spanish Government prior to the "Treaty of Gaudalupe Hidalgo," and the court also then and there erred upon said trial in rejecting and excluding from the consideration of said court and jury all the documentary evidence offered by these defendants and marked as exhibits in this cause, showing title and possession in these defendants and those under whom they claim, to wit, the will of Antonio Sandoval, the partition and division of said lands between the devisees of said Sandoval, and the deeds from the heirs of the said Sandoval, and the two powers of attorney, authorizing the conveyance of said lands, and the letters of administration of the estate of the said Sandoval, and the evidence of the existence of the title papers of the said Sandoval to said lands, and the destruction thereof by robbers, and all the evidence offered by these defendants upon said trial to prove title and possession of these defendants and
143 those under whom they claim to said bonds, all said documentary evidence aforesaid being competent and legal in this case to support the title in fee simple of these defendants to said lands.

Thirdly. The court erred in not submitting to the jury, upon said trial, all said documentary and parol evidence offered by these defendants.

Fourth. The court erred in withdrawing the evidence and facts presented by defendants upon said trial from the consideration of the jury, and deciding that the matters in controversy were purely questions of law for the court and not questions for the consideration of the jury.

Fifth. The court erred upon said trial in directing a verdict in this case for the plaintiff, against the remonstrance of the defendants, in any amount whatever.

Sixth. The court erred upon said trial in directing any verdict or judgment beyond nominal damages against defendants, or in directing any verdict whatever in favor of the plaintiff, and the court also erred in refusing to charge, at the instance of the defendants, to find a verdict upon the evidence in favor of these defendants.

Seventh. The court erred in its written charge to the jury to find a verdict for the consideration money or purchase price of said land in the entire charge, in charging or directing any verdict in favor of plaintiff and against these defendants, because there was no such evidence or any evidence of a legal or competent character to authorize or justify the court in said charge, or in directing any finding whatever for the plaintiff, and because the plaintiff's declaration in this case and the evidence offered by him in support thereof did not and does not show any cause or ground of action whatever against

these defendants in law or in fact, or any breach whatever of
144 the pretended implied covenant sued on in this action.

Eighth. The finding of the court and direction of the court upon said trial is against the law and evidence in this case.

Ninth. The finding of the jury is against the law and evidence in this case.

Tenth. The amount found by the jury, by direction of the court, in favor of the plaintiff and against defendants is excessive and against the law and evidence in the case.

Eleventh. The finding of the court and jury should have been in favor of the defendants.

Twelfth. The court admitted upon said trial incompetent and illegal evidence, both oral and documentary, in favor of the plaintiff and against defendants.

Thirteenth. The court refused upon said trial competent and legal evidence, both oral and documentary, offered upon said trial by these defendants.

Fourteenth. The court erred upon said trial in each and every ruling, step, or direction, charge, and judgment directed and rendered against these defendants.

Fifteenth. The court erred in sustaining plaintiff's demurrer to defendants' special plea of seizen.

Wherefore these defendants ask and move the court to set aside said judgment of the court, verdict, and finding of the jury rendered herein, and to award to these defendants a new trial in this cause without the payment of costs.

STEARNS & DOUGLAS,
S. M. BARNES,
Attorneys for Defendants.

The following is a copy of the motion of defendants in arrest of the judgment hereinbefore named, in the words and figures as follows, to wit:

145 (*Motion in Arrest of Judgment.*)

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting within and for the County of Bernalillo. May Term, A. D. 1884.

WALLACE DOUGLASS, Plaintiff,

vs.

CHARLES W. LEWIS *et al.*, Defendants.

Covenant.

And now comes the defendants, Charles W. Lewis and his wife, Jessie A. Lewis, by their attorneys, Stearns & Douglas and S. M. Barnes, and move the court to arrest the judgment rendered in this case in favor of the plaintiff and against these defendants, and va-

cate the verdict of the jury rendered in this action, for the following reasons and upon the following grounds, to wit:

First. The plaintiff's declaration in this case does not show or set forth any ground or cause of action whatever upon which plaintiff is entitled to recover a judgment or verdict herein.

Secondly. Said declaration does not upon its face show or allege that the plaintiff has been evicted from the possession of the land in contest or any part thereof; nor does said declaration show that defendants have committed any breach of their covenant of warranty contained in the deed of conveyance to the land in controversy; nor does the declaration show any lawful breach of any covenant of title whatever whereby plaintiff is entitled to recover against these defendants; said declaration fails to show any damage or injury whatever, and said declaration fails to show any tender back to these defendants of the lands named in said plaintiff's declaration
146 or any part thereof; nor does said declaration aver or show any reconveyance or offer to reconvey to these defendants the lands in contest.

Wherefore said defendants pray that said judgment herein rendered be arrested and set aside.

STEARNS & DOUGLAS,
S. M. BARNES,
Atty's for Defendants.

Whereupon, after consideration, the court then and there overruled the motion of the defendants and grounds for a new trial as herein stated, and also overruled and refused to arrest the judgment and the grounds of the defendants in arrest thereof, as before set forth herein. To each of the aforesaid rulings and refusals of the court to grant a new trial and arrest the judgment as aforesaid the defendants then and there duly excepted.

And as the matters and things herein contained do not appear of record the defendants tender this their bill of exceptions and ask that the same be made matter of record, which is done, and the said bill of exceptions is allowed by the court and signed and sealed.

Dated Oct. 20, 1884.

JOSEPH BELL. [SEAL.]

The attorneys agree that the foregoing bill of exceptions may be signed by the judge of this court in form as herein presented.

H. L. WARREN,
STONE & STONE,
Att'ys for Plaintiff.
STEARNS & DOUGLAS AND
BARNES, *Att'ys for Defendants.*

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo. }

I, the undersigned, clerk of the district court of the Terri-
147 tory of New Mexico for the county of Bernalillo, in the second judicial district, do hereby certify that the foregoing is a true

copy of the record and all the proceedings in the action of covenant of Wallace Douglass against Charles W. Lewis and wife, lately pending in said district court, as the same remain in my office.

Witness my hand and the seal of said district court this 27th day of October, 1884.

[Seal of Bernalillo County, D. C., New Mexico.]

EDMUND H. SMITH.

148 And afterwards, to wit, on the second day of January, 1885, there was filed in the clerk's office of said supreme court the said appellants' assignment of errors; which said assignment of errors is in the words and figures following, to wit:

Assignment of Errors.

CHARLES W. LEWIS and JESSIE A. LEWIS, his Wife, Appellants,

vs.

WALLACE DOUGLASS, Appellee.

The appellants in the above-entitled cause, defendants in the court below, now come, by their attorneys, Stearns and Douglas and S. M. Barnes, and assign the following errors and causes of reversal in this case, to wit:

First. The district court below erred, to the prejudice of the appellants and defendants herein, in overruling the demurrer of the appellants to the appellee's declaration herein.

Second. The court below erred in sustaining the plaintiff's demurrer to the defendants', now appellants', first additional plea of seizure.

Third. The court erred in admitting plaintiff's testimony and in overruling defendants' motion to exclude plaintiff's evidence offered upon the trial of said case, both documentary and oral.

149 Fourth. The court erred in overruling defendants' motion and grounds for a new trial and in arrest of judgment.

Fifth. The court erred in not sustaining the motion of the defendants pending said trial to exclude from the consideration of the court and jury the plat and report of the surveyor general of the Territory of New Mexico, referred to in the testimony of Max Frost, and also in receiving the evidence of said Frost.

Sixth. The court erred in rejecting and excluding from the consideration of the court and jury the testimony of defendants' witnesses, to wit, Charles W. Lewis, Jesus Baca, Teodoro Lopez, Jose Lueras, Juan Armijo, Atanacio Montoya, and also in refusing to permit said testimony to be read in evidence to and considered by the jury, and also in rejecting all the documentary evidence offered by said defendants upon said trial from the consideration of the court and jury, which documents are marked as defendants' exhibits in said case; which oral and documentary evidence of said defendants show and tend to show possession and title in fee simple and a long

continued adverse possession of these defendants and those under whom they claim the lands in contest in this case.

150 Seventh. The court erred in withdrawing the evidence and facts presented by defendants upon said trial from the consideration of the jury, and particularly in deciding and directing that the matters in controversy were purely questions of law for the court and not questions for the consideration of the jury.

Eighth. The court erred upon the said trial in directing a verdict in this case for the plaintiff against the remonstrance of the defendants in any amount whatever, there being no sufficient evidence to support said verdict.

Ninth. The court erred upon said trial in directing any verdict or judgment beyond nominal damages against defendants or in directing any verdict whatever in favor of the plaintiff, and also in refusing to charge, at the instance of defendants, to find a verdict upon the evidence in favor of these defendants.

Tenth. The court erred in its written charge to the jury to find a verdict for the consideration money or purchase price of said land, and in the entire charge in charging, ordering, or directing

151 any verdict in favor of plaintiff against defendants, because there was no such evidence or any evidence of a legal or competent character to authorize or justify the court in his said charge and because the plaintiff's declaration in this case and the evidence offered by him in support thereof did not and does not show any ground or cause of action whatever against defendants, in law or in fact.

Eleventh. The finding of the jury is against the law and evidence in this case.

Twelfth. The amount found by the jury, by direction of the court, in favor of the plaintiff and against the defendants is excessive and against the law and evidence in the case.

Thirteenth. The finding of the court and jury should have been in favor of the defendants.

Fourteenth. The court erred upon said trial in each and every ruling, step, order, direction, charge, and judgment directed and rendered against these defendants.

Wherefore a reversal is respectfully asked.

STEARNS & DOUGLAS,
S. M. BARNES,
Attorneys for Appellants and Defendants.

152 And be it furthered remembered that — Monday, the fifth day of January, A. D. 1885, being the first day of the regular January, 1885, term of the supreme court of the Territory of New Mexico, the following, among other, proceedings were had, to wit:

Appearance and Order Setting for Argument.

WALLACE DOUGLASS, Appellee,
vs.
CHARLES W. LEWIS *et al.*, Appellants. } 221.

Appeal from 2nd district, Bernalillo county.

Now comes said plaintiff and appellee, by his attorneys, Messrs. Stone & Stone and Messrs. Fiske and Warren, and enters his appearance herein, and it is thereupon ordered that this cause be, and the same hereby is, set down for argument at the incoming of court on the third Tuesday of the present term.

And be it further remembered that on Wednesday, January 28th, 1885, being the twenty-first day of said term of said supreme court, the following, among other, proceedings were had, to wit:

153 *Argument.*

WALLACE DOUGLAS, Appellee,
vs.
CHARLES W. LEWIS *et al.*, Appellants. } 221.

Appeal from 2nd district, Bernalillo county.

This cause, now coming on to be heard upon the record, assignment of errors, and briefs on file herein, *and* is argued by S. M. Barnes, Esquire, on behalf of said appellants, and by W. S. Stone, Esquire, on behalf of said appellee.

And be it further rem-bered that on Thursday, January 29th, 1885, being the twenty-second day of said term of said supreme court, the following, among other, proceedings were had, to wit:

Argument Continued.

WALLACE DOUGLASS, Appellee,
vs.
CHARLES W. LEWIS *et al.*, Appellants. } 221.

Appeal from 2nd district, Bernalillo county.

This cause, again coming on to be heard upon the record, briefs, and assignment of errors filed herein, is further argued by S. M. Barnes and by F. T. Douglas, Esquires, on the part of said appellants, and by Henry L. Warren, Esquire, on the part of said appellees, and submitted to the court, and the court, not being
154 sufficiently advised in the premises, takes the same under advisement.

And be it further remembered that on Tuesday, the fifth day of

January, 1886, being the second day of the regular January, 1886, term of the supreme court of the Territory of New Mexico, the following, among other, proceedings were had, to wit:

Set for Argument.

WALLACE DOUGLASS, Appellee,
vs.
CHARLES W. LEWIS *et al.*, Appellants. } 221.

Appeal from 2d district, Bernalillo county.

It is ordered that this cause be, and hereby is, set down for argument at the incoming of court on next Friday morning.

And be it further remembered that on Saturday, January 9th, 1886, being the 6th day of said term of said supreme court, the following, among other, proceedings were had, to wit:

Argument.

WALLACE DOUGLASS, Appellee,
vs.
CHARLES W. LEWIS *et al.*, Appellants. } 221.

Covenant.

Appeal from 2nd district, Bernalillo county.

155 This cause, coming on to be heard upon the record, assignment of errors, and briefs on file herein, is argued by S. M. Barnes, Esquire, on behalf of said appellants.

And afterwards, on, to wit, the 11th day of January, 1886, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a stipulation in the above-entitled cause, which stipulation is in words and figures as follows, to wit:

Stipulation.

In the Supreme Court. January Term, 1886.

WALLACE DOUGLASS, Appellee,
vs.
CHARLES W. LEWIS *et al.*, Appellants. } No. 221.

It appearing that the tracing of the original map introduced in evidence by the plaintiffs below, and being the official map of the United States showing the extension and completion of the official surveys of the United States Government over and including the whole of township nine (9) north and range three (3) east of the United States survey of the Territory of New Mxico, and which original map was and is on file in the office of the register and re-

ceiver of the United States land office at Santa Fé, in said
156 Territory, and duly made and authenticated by the surveyor general of the United States for said Territory, showing by said map that the whole of sections numbered five (5) and six (6) in said township and range were part of the public domain, and had been, on May 13th, 1882, disposed of in part to persons under timber culture act other than the appellants, and that the remainder at said date was subject to entry or other disposition, according to said map, under the land laws of the United States; also the tracing of the map introduced in evidence by the plaintiffs below made by Paulson, civil engineer, and marked for identification Plaintiff's "Exhibit B," and showing that the land described in the deed from Charles W. Lewis and wife, appellants herein, to Wallace Douglass, appellee herein, dated May 13th, 1882, and of which Plaintiff's "Exhibit A" is a copy, was at the date of said deed included in and was a part of said sections five and six in said township and range, and which said tracings are mentioned in the stipulation between the
the parties hereto appearing, on pages 75 and 76 of the printed
157 transcript on file in this cause and not on file herein or produced at the hearing of this cause, it is, therefore, stipulated and agreed that said maps, respect*fully*, showing the facts above mentioned may be taken and considered as being on file and before the court, and said facts in regard to said maps, respectively, and the recitals therein contained and hereinbefore set forth shall be taken and considered by the court as admitted by said parties upon the hearing hereof, and such admission may be considered and taken in lieu of said original maps or said tracings thereof, as mentioned in said stipulation, and that the printed transcript of the original transcript returned by the clerk of the district court shall be treated and considered as the original transcript, said original being mislaid.

BARNES & KNAEBEL,
Att'ys for Appellants.
STONE & STONE,
H. L. WARREN,
Atty's for Appellee.

And be it further remembered that on Monday, January
158 11th, 1886, being the seventh day of term of said supreme court, the following, among other, proceedings were had, to wit:

Argument.

WALLACE DOUGLASS, Appellee,
vs.
CHARLES W. LEWIS *et al.*, Appellants. } 221.

Appeal from 2nd district, Bernalillo county.

This cause, again coming on to be heard upon the record, assignment of errors, and briefs filed herein, is further argued on behalf of said defendants and appellants by John H. Knaebel, Esquire, and

on behalf of said plaintiff and appellee by W. S. Stone and H. L. Warren, Esquires, and submitted to the court, and the court, not being sufficiently advised in the premises, takes the same under advisement.

And be it further remembered that on Saturday, January 23rd, 1886, being the eighteenth day of said term of said supreme court, the following, among other, proceedings were had, to wit:

159 *Judgment.*

WALLACE DOUGLAS, Appellee,
vs.
CHARLES W. LEWIS and JESSIE A. LEWIS. } 221.

Appeal from Bernalillo county.

This cause having been argued by counsel and submitted to and taken under advisement by the court at a former day of the present term, the court, being now sufficiently advised in the premises, announces its decision, by Associate Justice Henderson, reversing the judgment of the lower court and dismissing this cause for reasons set forth in the opinion on file, all of the members of the court concurring. It is therefore considered and adjudged by the court that the judgment in this cause of the district court within and for the county of Bernalillo, whence this cause came into this court, be, and the same hereby is, reversed, vacated, and set aside; and it is further considered and adjudged by the court that the said defendants and appellants go hence without day and recover of said plaintiff and appellee their costs in this behalf expended, as well in the lower court as in this court, to be taxed, and that execution issue therefor.

160 And afterwards, on, to wit, the 25th day of January, 1886, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a motion for a rehearing; which said motion is in words and figures as follows, to wit:

161 *Motion for Rehearing.*

In the Supreme Court, Territory of New Mexico. January Term, 1886.

WALLACE DOUGLAS, Plaintiff and Appellee,
vs.
CHARLES W. LEWIS, Defendant and Appellant.

Covenant.

The appellee moves the court for a rehearing in the above-entitled cause upon the following grounds, to wit:

1. The court not only reverses the judgement below, but dismisses the cause, when, upon the issues joined below, even if the judgement were reversed, the cause should be remanded for further proceedings, in accordance with the law as decided by this court.

2. The court holds that the express statutory covenant of seizin is limited and restricted by subsequent general covenant of warranty, when, under the adjudicated construction of the statute, such is not the law.

3. The court holds that, inasmuch as there can be no recovery upon the express general covenant of warranty contained in the deed without proof of eviction under superior title, the court below erred in directing the verdict and in overruling the motion in arrest of judgement, when the pleadings and evidence in the record show a constructive and sufficient eviction by the paramount outstanding title of the United States existing at the date of the deed.

FISKE & WARREN,
Att'ys for Appellee.

Brief of Points and Authorities.

1. The attention of this court was not specially brought to the issues joined and upon which the trial was had below.

The declaration is upon the express statutory covenant of seizin, which the court holds is, in effect, the same as the Missouri statute, and no reference is made to the subsequent written covenant. (Record, pp. 10, 11.)

The defendants first plead the general issue and a general demurrer to the declaration (p. 13), next an unverified plea *non est factum*, followed by a special plea of seizin in defendants (pp. 14 & 15), and afterwards they filed an amended special demurrer to the declaration, alleging, argumentatively, that the deed did not contain the alleged covenant of seizin declared on, because the subsequent written covenant of warranty restricted the statutory covenant, and also setting up that, no eviction being alleged in the declaration, the plaintiff could not recover (pp. 16 & 17).

This demurrer was overruled (pp. 18, 19, 20), and defendants filed their plea on May 16, 1884, specially pleading that defendants were "seized and possessed," &c. (not averring a title in fee simple, as alleged in the declaration and as embraced in the statutory covenant), and a further plea of seizure in themselves (pp. 21, 22). To the first of these last-mentioned pleas plaintiff demurred, and joined issue on the plea of seizin and also on the former pleas of the general issue and *non est factum* (p. 23).

Plaintiff's demurrer to the first additional plea was sustained and trial had on the remaining issues joined (p. 24).

We submit that defendants, by not standing on their demurrer to the declaration and by pleading over, waived the demurrer,
162 and by going to trial on the pleas adjudged good without standing on the plea which was adjudged bad on the demurrer.

It is thus plain that the only issue in the case upon the pleadings was whether the defendants were seized of an estate in fee simple commensurate with that imported by the statute, and for breach of which covenant the declaration proceeds, and upon this issue the execution of the deed containing this statutory covenant being proven the burden rested upon defendants to show a title commensurate with that covenant.

This was the theory and issue upon which the trial was had and upon which the court directed the verdict for plaintiff, because defendants' evidence only tendered to show an unconfirmed and unrecognized Mexican grant in apposition to the United States title assent as sovereign and supreme by extending the Government surveys over it and throwing it open to all citizens under the public land laws.

Now, under the well-established laws of pleading authoratively decided by the U. S. Supreme Court and in this Territory, even if defendants did not waive all benefit of the demurrers and questions of law involved by pleading over, yet, even admitting that they have the benefit of carrying back the demurrer to the plea to the pleading where the first error occurred, the only effect of this court's decision upon the question of law raised in the pleadings will be to decide upon the motion in arrest of judgement that the court below erred in overruling the demurrer to the declaration.

The effect of this will be to require the plaintiff to amend his declaration under our practice, not to dismiss his action. The action is for breach of covenants in the deed, and while plaintiff only assigned breach of the covenant of seizure he can, by amendment, assign breach of covenant of warranty, in support of which the existence of the paramount title and legal and constructive possession of the United States, amounting in law to an actual eviction, can be shown.

We call special attention to this question of pleading as expressly held in—

Beale *vs.* Territory, 1 New Mexico, p. 513, and particularly Aurora City *vs.* West, 7 Wallace, pp. 90, 91, 92, 93, 94, and numerous other cases cited.

United States *vs.* Boyd, 5 Howard (16 Curtis), 298.

Watkins *vs.* United States, 9 Wallace, 762.

United States *vs.* Boyd, 5 Howard, 51.

At most the court should, upon the conclusion reached, remand and not dismiss the case.

2. The court holds that our statute is borrowed from Missouri. We submit that the construction given in Missouri should, under all the decisions, be adopted here in preference to that of other States. The Pennsylvania statute, which is construed and followed in the cases cited there and in other States, differs from the Missouri act in the essential particular that the statutory covenants are dependent and limited one by another, while it is expressly held in Missouri and other States which have a statute like ours that these covenants are distinct and independent.

Rawle on Cov., p. 486, *vs.* (as to Pennsylvania).
" " " " 492 " (" Missouri).

If the Legislature desire it is for them to amend the statute and adopt some other, but as long as it remains the court should not allow arguments in regard to its dangerous policy or effects to control its adjudicated effect.

FISKE & WARREN,
Att'ys for Appellee.

Endorsed: 221. In the supreme court. Wallace Douglass *vs.* Charles W. Lewis *et al.* Motion for rehearing. Filed in my office this 25th day of Jan., 1886. C. M. Phillips, clerk. Fiske & Warren, att'ys for appellee.

163 & 164 And be it further remembered that on Saturday, January 24th, 1886, being the twenty-fourth day of said term of said supreme court, the following, among other, proceedings were had, to wit:

Order Denying Motion for Rehearing.

WALLACE DOUGLASS, Appellee,
vs.
CHARLES W. LEWIS *et al.*, Appellants. } 221.

Covenant.

Appeal from Bernalillo county.

The said plaintiff and appellee having heretofore filed herein a motion for rehearing in this cause, *and* the court, having considered said motion and being sufficiently advised in the premises, denies the same. It is, therefore, ordered by the court that the motion of said plaintiff and appellee for a rehearing herein be, and the same hereby is, denied.

165 And afterwards, on, to wit, the tenth day of February, 1886, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a bond in the above-entitled cause, which is in words and figures as follows, to wit:

Bond.

In the Supreme Court of the United States.

WALLACE DOUGLASS, Plaintiff in Error,

vs.

CHARLES W. LEWIS and JESSIE A. LEWIS, Defendants in Error.

Covenant.

166 Know all men by these presents that we, Wallace Douglass, Charles W. Kennedy, and John McMillan, of the county of Bernalillo and Territory of New Mexico, are held and firmly bound unto Charles W. Lewis and Jessie A. Lewis, of the same county and Territory, in the sum of one thousand dollars, to be paid to the said Charles W. Lewis and Jessie A. Lewis, their respective executors and administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 6th day of February, A. D. 1886.

Whereas the above-named Wallace Douglass hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the Territory of New Mexico:

Now, therefore, the condition of this obligation is such that if the above-named Wallace Douglass shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

WALLACE DOUGLASS. [SEAL.]
167 CHARLES W. KENNEDY. [SEAL.]
JOHN McMILLAN. [SEAL.]

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

Before me, the undersigned, a notary public within and for the county and Territory aforesaid, personally came Charles W. Kennedy and John McMillan, who, being first duly sworn, each for himself and not one for the other on his oath says that he is worth the sum of one thousand dollars over and above his debts and liabilities and the amount exempt by law from sale and execution in property situate in the Territory of New Mexico.

CHARLES W. KENNEDY.
JOHN McMILLAN.

Subscribed and sworn to before me this 6th day of February, 1886.
[NOTARIAL SEAL.] T. R. STORY,
Notary Public.

Approved by—
ELISHA V. LONG,
Chief Justice of the Supreme Court,
Territory of New Mexico.

168 Endorsed: In the Supreme Court of the United States. Wallace Douglass, plaintiff in error, *vs.* Charles W. Lewis and Jessie A. Lewis, defendants in error. Security for costs. Filed in my office this 10th day of February, 1886. C. M. Phillips, clerk.

And afterwards, on, to wit, the tenth day of February, 1886, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an affidavit of valuation in the above-entitled cause, which is in words and figures as follows, to wit:

Affidavit of Value.

TERRITORY OF NEW MEXICO, } ss:
County of Santa Fé, }

WALLACE DOUGLAS, Appellee,
vs.
CHARLES W. LEWIS *et al.*, Appellants.

H. L. Warren, being duly sworn, deposes and says that he

169 is agent and attorney for the appellee in the above-entitled cause, and that the value of the property in controversy in said suit exceeds the sum of five thousand dollars exclusive of costs and fees.

H. L. WARREN.

Subscribed and sworn to before me this February 10, 1886.

[SEAL.] C. M. PHILLIPS,
Clerk Supreme Court, Territory of New Mexico.

Endorsed: Wallace Douglass, appellee, *vs.* Charles W. Lewis *et al.*, appellants. Affidavit of value. Filed in my office this 10th day of February, 1886. C. M. Phillips, clerk.

And afterwards, on, to wit, the tenth day of February, 1886, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico plaintiff in error's assignment of errors, which said assignment of errors is in words and figures as follows, to wit:

170 *Assignment of Errors.*

In the Supreme Court of the United States, of the October term, one thousand eight hundred and eighty-six.

WALLACE DOUGLASS, Plaintiff in Error,

vs.

CHARLES W. LEWIS and JESSIE A. LEWIS, Defendants in Error.

Covenant.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Wallace Douglass, by Henry L. Warren, his attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1. The court below, the supreme court of the Territory of New Mexico, erred in its opinion and decision upon the record in said cause in reversing the judgment of the district court of the second judicial district in and for the county of Bernalillo, in said Territory.

2. The court erred in dismissing or ordering to be dismissed the said action and in not remanding the same.

171 3. The said court erred in its opinion and decision in said cause in deciding and adjudging that the covenant of warranty, written and contained in the deed of conveyance in evidence executed by defendants in error to plaintiff in error, limited, restricted, or restrained the legal effect and operation of the covenant created and implied by the statute of said Territory and by force of said statute incorporated into said deed of conveyance.

4. The said court erred in dismissing and in not remanding the

said cause, with leave to plaintiff to amend his declaration as he might be advised or for further proceedings in accordance with said decision.

5. The said court erred in its decision that said defendants in error, by pleading over to plaintiff's declaration after their demurrer thereto had been overruled, did not waive their said demurrer.

6. The said court erred in overruling the motion of plaintiff in error for a rehearing of the said cause upon the grounds in said motion set forth.

7. The judgment and decision of the said court upon the record in said cause was in favor of the defendants in error, and dis-
172–174 missed the said action and reversed the judgment of said district court when the same should have been in favor of plaintiff in error, and said judgment rendered by said district court should have been affirmed.

And the said Wallace Douglass prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by occasion of the said judgment.

HENRY L. WARREN,
Attorney for Plaintiff in Error.

Endorsed: In the Supreme Court of the United States. Wallace Douglass, plaintiff in error, *vs.* Charles W. Lewis *et al.*, defendants in erorr. Assignment of errors. Filed in my office this 10th day of February, 1886. C. M. Phillips, clerk.

175 The United States of America to Charles W. Lewis and Jessie A. Lewis, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of New Mexico, wherein Wallace Douglass is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to all parties in that behalf.

Witness the Honorable Elisha V. Long, chief justice of the supreme court of the Territory of New Mexico, this tenth day of February, in the year of our Lord one thousand eight hundred and eighty-six.

ELISHA V. LONG,
Chief Justice Supreme Court, Territory of New Mexico.

176 [Endorsed:] Wallace Douglass, plaintiff in error, *vs.* Charles W. Lewis and Jessie A. Lewis, defendants in error. Citation (original to be returned). Filed in my office this 17th day of February, 1886. C. M. Phillips, clerk.

THE UNITED STATES OF AMERICA, *Territory of New Mexico:*

I, Romulo Martinez, marshal of the United States for the Territory of New Mexico, do hereby certify that I served the within by

reading the same and by delivering a true copy hereof to Charles W. Lewis and Jessie A. Lewis, the persons mentioned in said citation, at Albuquerque, in the Territory aforesaid, on this the 16th day of February, A. D. 1886.

ROMULO MARTINEZ,
Marshal of the United States for the Territory of New Mexico,
By JUAN CHAVEZ,
Deputy Marshal.

Marshal's fee, $2.50, service & ret.; paid by Wallace Douglass.

177 And heretofore on, to wit, the 23rd day of January, 1886, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico the opinion of the judges of said court in said cause, a copy of which is hereto annexed, in accordance with the amendment to rule 8th of the Supreme Court of the United States, to be herewith transmitted, which is in words and figures as follows, to wit:

178 *Opinion.*

In the Supreme Court. January Term, 1886.

WALLACE DOUGLASS, Appellee and Pl'ff,
vs.
CHARLES W. LEWIS *et al.*, Appellants and Def'ts.

Appeal from the district court of Bernalillo county.

This is an action of covenant and was instituted in the court below by the plaintiff Douglass on an alleged covenant of seizin contained in a deed of conveyance made by the defendant, Charles W. Lewis, and Jessie A. Lewis, his wife, on the 13th day of May, 1882. On that day Lewis and wife executed and delivered to Douglass this deed, conveying one hundred and sixty acres of land lying in Bernalillo county, and received therefor five thousand three hundred and thirty-three dollars and thirty-three cents ($5,333.33), and on the same day put Douglass into possession of the premises.

The declaration is founded upon an alleged breach of the covenant of seizin. To the declaration a demurrer was interposed and
179 overruled by the court. Defendants filed pleas, to which demurrers were sustained. Additional pleas being filed, issues were joined.

Appellants assign fourteen alleged errors in the record. We think it unimportant in this case to consider the alleged errors committed by the court in overruling the demurrer to the declaration or in sustaining demurrers to their first pleas.

The questions discussed in this opinion may be considered under the 4th and 8th assignments of error, which are as follows:

Fourth. The court erred in overruling defendants' motion and grounds for a new trial and in arrest of judgment.

Eighth. The court erred upon the said trial in directing a verdict

in this case for the plaintiff against the remonstrance of the defendants in any amount whatever, there being no sufficient evidence to support said verdict.

The plaintiff was in possession of the land when he brought this suit, and had not in any way been disturbed in the quiet enjoyment thereof. There was no express covenant of seizin in the deed,
180 but there was both a special and general covenant of warranty.

The contention of the plaintiff is that the deed contained an implied covenant of seizin by force of the terms of a statute in force at the date of the execution of the deed, and so the court below held, and directed the jury to find for him and assess his damages at the sum paid for the land. It will serve no useful purpose to state what the facts were, as shown by the evidence at the trial.

The statute relied on by the plaintiff is as follows, section 2750 Compiled Laws (1884):

"The words 'bargained and sold,' or words to that effect, in all conveyances of hereditary real estate, unless restricted in express terms on the part of the person conveying the same, himself and his heirs, to the person to whom the property is conveyed, his heirs and assignees, shall be limited to the following effect: First. That the grantor at the time of the execution of the conveyance is possessed of an irrevocable possession in fee simple to the property so conveyed.

"Second. That the said real estate at the time of the execu-
181 tion of said conveyance is free from all incumbrances made or suffered to be made by the grantor or by any person claiming the same under him.

"Third. For the greater security of the person, his heirs and assignees, to whom the said real estate is conveyed by the grantor and his heirs, suits may be instituted the same as if the conditions were stipulated in the said conveyance."

Appellant's counsel contends that this section is so uncertain and obscure that it must be declared void. That there is some obscurity and uncertainty growing out of the use of several words and phrases in this section cannot be denied. The rule of law on this subject may be stated as follows: Where the statutory terms are of such uncertain meaning, or so confused that the courts cannot discern with reasonable certainty what is intended, they will be declared void.

McConville *vs.* Jersey City, 10 Vroom, 38.
Cheezan *vs.* The State, 2 Ind., 149.
King *vs.* The State, 2 Ind., 523.
Sullivan *vs.* Adams, 3 Gray, 476.
The State *vs.* Leibtke, 9 Neb., 468.
State *vs.* Craig, 23 Ind., 185.
Bishop on the Written Law, 41.

182 Courts will not, however, declare an enactment void on account of slight inaccuracies of expression.
Evans *vs.* Commonwealth, 3 Met., 453.
Haynes *vs.* The State, 5 Humph., 120.
The State *vs.* Cooper, 5 Day, 250.
People *vs.* Shepard, 36 N. Y., 285.

The cardinal rule in the interpretation of statutes is to ascertain if possible the legislative purpose or intention in the enactment of a law. This rule is of such universal recognition that we will not cite authorities in its support. This statute was enacted in 1852. We are warranted in looking back to that period to ascertain the surroundings of the Legislature, the language in which the act was passed, the difficulty and improbability of a verbally correct translation into English, and determine by these and other consideration what was meant by the use of the words and somewhat obscure phrases employed in the section as it now appears in the statutes of the Territory.

It is conceded that the Legislature undertook to pass an act, of which this section was a part, on the subject of the conveyance of real estate, and to copy a statute then in force in the
183 State of Missouri on that subject. The statute was passed in the Spanish language and has undergone several translations into English. It will be seen that there was an effort to translate an English statute into Spanish and to enact it in that tongue, and again translate it into English without any special care being taken to reproduce the statute into English exactly in terms as originally found in Missouri. We think it reasonably certain that the phrase "hereditary real estate" means real estate of inheritance. Again, "possessed of an irrevocable possession in fee simple," with like reasonable certainty, means seized of an indefeasible estate in fee simple, and that "limited to the following effect" may be read, construed to the following effect. If this be true, we have ascertained with that degree of certainty the meaning of the statute that makes it our duty to uphold and enforce it.

In Armijo *vs.* The New Mexico Town Company, at the last term, Chief Justice Axtell, in delivering the opinion of the court,
184 went outside of the questions properly before it, and in a dictum declared this section void. There was no concurrence by any other member of the court in his views on this subject; hence, it need not be considered as in any sense binding. Having disposed of the objection to the validity of the statute, we will look into the record to ascertain whether the pleadings and proofs on the part of the plaintiff were such as to justify the court below in directing the jury to find for him.

The contention of appellants' counsel is that, inasmuch as there is no express covenant of seizin in the deed and that there is a covenant of warranty, the covenant of warranty must be construed and treated as a limitation and restriction in legal effect, in express terms, upon their liability as grantors in the deed. This view was adopted by the supreme court of Miss.

In Weems *vs.* McCaughan, 7 Smedes & Marshall R., 422, Sharkey, J., in delivering the opinion of the court, said: "The covenant-raised by law from the use of particular words in the deed are
185 only intended to be operative when the parties themselves have omitted to insert covenants; but when the party declares how far he will be bound to warrant—that is, the extent of his covenant—the law will not hold him bound beyond it."

See Cruise on Real Property, 449; Vanderkan *vs.* Vanderkan, 11 Johns, 122; Brown *vs.* Smith, 5 Howard, 387; Finley *et al. vs.* Steele, 23 Ill., 54, is also directly in point. This case approves the rule laid down in Weems *vs.* McCaughan, *supra*, and in addition thereto states many reasons, as we think, of the highest public importance why an implied covenant ought not to exist in such cases.

It is very well known that the words "grant, bargain, and sell" at common law had no technical meaning attached to them. They have never been held to imply a covenant of any kind unless under statutory enactment, although they have been generally used in the granting clause in conveyances. It is true that the words employed in a deed must be construed most strongly against the
186 grantor. This rule, however, ought not to be adopted here for the reason that the statute is in derogation of the common law, and should be construed strictly.

As said by the Ill. court, "There is scarcely a court before which this statute has come for construction that has not characterized it as a provision of dangerous tendency, calculated to entrap the ignorant and unwary into liability which they never intended to incur." Findley *et al. vs.* Steele, 23 Ill., 54. See also Collier *vs.* Gamble, 10 Mo., 473. Had Lewis written out this statutory covenant and put it into his deed, and had also inserted the covenant of warranty, it would present a very different question, as by that act it would appear to have been his intention that both covenants should be operative. In such case the court would enforce both, and thereby give effect to the intention of the parties.

Rawle on Covenants for Title, at page 492, in discussing the effect upon an implied or statutory covenant by the insertion of an
187 express covenant of general warranty, says: "The effect of this is of course to deny to a purchaser the benefit of the statutory covenant for seizin when he has also received an express covenant of warranty, and under such circumstances it would seem that there could never be a recovery without an eviction."

As there is no pretense in this case of an eviction or any claim whatever of a breach of the covenant of warranty, it follows that the action cannot be maintained, and that it was error in the court below to order a verdict for the plaintiff, and in overruling the motion in arrest of judgment.

For these errors the judgment is reversed and cause dismissed with costs of both courts to appellee.

W. F. HENDERSON,
Associate Justice.

We concur.

ELISHA V. LONG, *C. J.*
WM. H. BRINKER, *J.*

188 UNITED STATES OF AMERICA, *Territory of New Mexico:*

I, C. M. Phillips, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing is a true and complete copy of the record of proceedings had, judgment given, and opinion filed in the cause herein mentioned as the same now appears remaining in my office.

In witness whereof I have hereunto subscribed my name and affixed the seal of the supreme court of the Territory of New Mexico, at Santa Fé, this seventeenth day of February, A. D. 1886.

C. M. PHILLIPS, *Clerk.*

[Seal Supreme Court, Territory of New Mexico.]

Endorsed on cover: New Mexico supreme court. No. 226. Wallace Douglass, plaintiff in error, *vs.* Charles W. Lewis and Jessie A. Lewis, his wife. Filed February 25, 1886.

FILED.
APR 2 1889
JAMES H. McKENNEY
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 226.

WALLACE DOUGLASS,
PLAINTIFF IN ERROR,

vs.

CHARLES W. LEWIS AND JESSIE A. LEWIS, HIS WIFE,
DEFENDANTS IN ERROR.

BRIEF FOR APPELLANT.

BY J. H. McGOWAN AND
C. W. HOLCOMB.

WASHINGTON:
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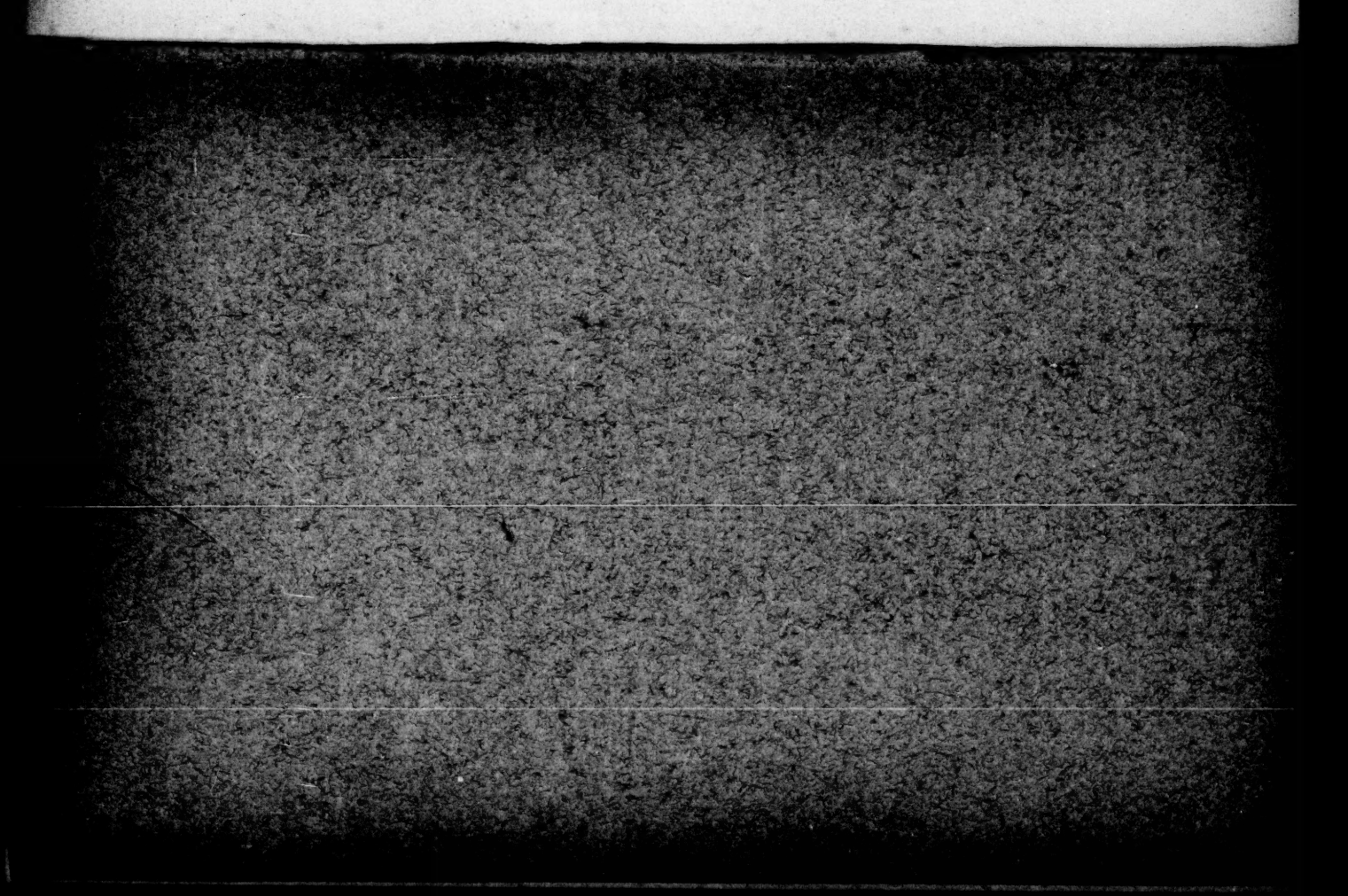

IN THE

Supreme Court of the United States.

WALLACE DOUGLASS, Plaintiff in Error, v. CHARLES W. LEWIS and JESSIE A. LEWIS, his wife, Defendants in Error.	No. 226.

Brief for Appellant.

Statement.

This case comes here on appeal from the supreme court of the Territory of New Mexico.

It was appealed to that court from one of the district courts of the Territory.

The action was on a covenant of seisin in a deed, made by defendants in error to plaintiff in error, purporting to convey the title to 160 acres of land. After describing the premises, the declaration avers:

"And the defendants did by their said deed, for themselves, their heirs, and personal representatives, covenant with the plaintiff, his heirs, and assigns, amongst other things, that at the time of the making, ensealing, and de-

livery of said deed and 'at the time of the execution of said conveyance' they, the said defendants, were lawfully seized of an indefeasible estate and in possession of a title in fee-simple in and to the said property, and then had good right and full power to convey the same. Nevertheless plaintiff avers that the said tract of land in said deed described and by said defendants bargained and sold to said plaintiff was not the property of said defendants, and at the time of the making and delivery of said deed they, the said defendants, were not lawfully seized of an indefeasible estate in fee-simple in and to said real estate, nor had they then good right and full power to convey the same, but, on the contrary thereof, the Government of the United States had at the time of the making and delivery of said deed and still has lawful right and title to said real estate.

"And plaintiff avers that in consideration of the conveyance and sale of said lands in said deed described and set forth he paid to said defendants the sum of five thousand three hundred and thirty-three dollars and thirty-three cents ($5,333.33); that he, said plaintiff, has further expended and laid out large sums of money in building houses upon and improving said land, to wit, four thousand dollars." (Record, 3.)

The deed was made a part of the declaration and filed with the court. A copy will be found on page 44 of the record. It contains no specific covenant of seisin, but is what the court terms "a bargain and sale deed." That is, it uses the ordinary words of sale, "bargained, sold," &c., and contains a covenant of warranty by which the grantors covenant for themselves and their heirs, "the before described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said parties of the first part and their heirs; and against all and every person and persons whomsoever lawfully claiming or to claim the same, or any part

thereof, shall and will warrant and by these presents forever defend."

The covenant of seisin relied upon is that created by a statute of the Territory. It is found in the Territorial Compiled Laws of 1884, section 2750, and reads as follows:

"The words 'bargained and sold,' or words to that effect, in all conveyances of hereditary real estate, unless restricted in express terms on the part of the person conveying the same, himself and his heirs, to the person to whom the property is conveyed, his heirs and assigns, shall be limited to the following effect: First, that the grantor at the time of the execution of the conveyance is possessed of an irrevocable possession in fee-simple to the property so conveyed.

"Second. That the said real estate at the time of the execution of said conveyance is free from all incumbrances made or suffered to be made by the grantor or by any person claiming the same under him.

"Third. For the greater security of the person, his heirs and assignees, to whom the said real estate is conveyed by the grantor and his heirs, suits may be instituted the same as if the conditions were stipulated in the said conveyance." (Record, 102).

To the declaration the defendants both plead and demurred, filing the plea and demurrer at the same time. The plea (Record, 5) was one of *non est factum*. The demurrer was general, but subsequently a special amended demurrer was filed denying that the deed in question contained a covenant of seisin as set forth in the declaration.

The court overruled the amended demurrer with leave to the defendants to plead over.

The defendants then filed the following pleas:

"And the said defendants, Charles W. Lewis and his wife, Jessie A. Lewis, by their attorneys, Stearns & Doug-

las and S. M. Barnes, come and defend the wrong and injury when, &c., and, by leave of the court first had and obtained and for further plea, say that the said plaintiff ought not to have or maintain his aforesaid action thereof against the said defendants, because they say that the said defendant, Charles W. Lewis, husband of the said defendant, Jessie A. Lewis, at the time of the making and the delivery of the said deed in the said declaration mentioned, was seized and possessed of the said real estate and premises in the said declaration mentioned, and then had good right and full power and authority to convey the said real estate and premises according to the form and effect of the said deed and of the said covenant of the said defendants by them in that behalf made as aforesaid, at, to wit, the county of Bernalillo aforesaid, and of this the said defendants put themselves upon the country," &c. (Record, 10.)

"And, for a further plea, by leave of the court first had and obtained, in his behalf, these defendants, Charles W. Lewis and his wife, Jessie A. Lewis, say that the plaintiff ought not to have his aforesaid action against them, the said defendants, because they say that they, the said defendants, 'were lawfully seized of an indefeasible estate and in possession of a title in fee-simple in and to the said real property, and then had good right and full power to convey the same' according to the form and effect of the said indenture and of the said covenant by the said defendants in that behalf made as aforesaid, at, to wit, the county of Bernalillo aforesaid, and of this these defendants put themselves upon the country." (Record, 11.)

The plaintiff demurred to the first of these pleas, the court sustained the demurrer, and the case went to trial on the issue made up by the original declaration and plea and the second plea here given.

The bill of exceptions found in the record (pp. 20 to 88) discloses the proceedings on the trial. The plaintiff showed by the register of the U. S. land office at Santa Fé that the United States surveys had been extended over the land

in question, and this particular tract was found on sections 5 and 6, in town. 9 north of range 3 east. Part of the 160 acres (about 50 acres) was found to be inside a timber-culture entry, on section 6, and the balance of that section showed on the Government maps as vacant public land. Section 5, where a portion of the land is found, is included in the grant to the Atlantic & Pacific R.R. Co. Other evidence on the part of the plaintiff was also given, all tending to show that the United States had assumed ownership and control of all the land in controversy and had disposed of a portion of the same.

On a motion by the defendants to strike out portions of the testimony given by the register of the U. S. land office, the court held that the affirmative in the case, under the pleadings, was with the defendants, and the register had been permitted to testify because he wanted to leave.

The record shows that the defendants claimed that the land had been granted by Spain, or Mexico, they were not sure which, to one Antonio Sandoval; that Sandoval's title papers had been destroyed by robbers; that he had conveyed this tract by will to one of his relatives; that it had descended to the second generation of inheritors, who had deeded the same to defendant Lewis. To prove title in defendants they therefore offered in evidence the will of Sandoval, the proceedings of his administrators in attempting to make partition of the real estate of the deceased, and deeds of the heirs to defendants. There was also some oral proof offered to show the existence at one time of a grant to Sandoval, and of its destruction.

Three witnesses testify as to the existence of some kind of title papers held by Sandoval. Their entire testimony on that point we give here.

First. Jesus Baca testified:

"Do you know under what claim of title Antonio Sandoval, in his lifetime, claimed that land—the land in controversy—and other land adjacent to it?

"I do.

"State it?

"Under a title from the Mexican government.

"Did he so claim to have the title from the Mexican government whilst he lived upon the land and up to the time of his death?

"Yes, sir; he did.

"Did you ever see his title papers in the lifetime of Antonio Sandoval?

"I saw titles various times at the house of Antonio Sandoval; yes, sir.

"Of the lands in controversy here?

"Titles belonging to the land in question.

"COURT. Did you ever read them?

"I did not read them all, but he often showed them to us, saying that those were the title to this land.

("That is all excluded;" to which ruling the defendant by counsel, then and there duly excepts.)

"Do you know what became of these paper titles?

"I do; yes, sir.

"What?

"They were burned during a robbery committed on the house by thieves.

"How long before his death?

"It was, more or less, in 1858 or '9." (Record, 37.)

Second. Teodoro Lopez, who says he was mayor domo to Sandoval:

"Do you know anything about the papers being burned in any way—the titles to these lands."

"I do.

"State all you know about that.

"They tied me up and tried to burn me up with the papers. The thieves tied me up.

"What papers?

"All the most valuable papers of Don Antonio Sandoval.

"COURT. Did you ever read those papers?

"I don't know how to read. I did not.

"BARNES. Did Antonio Sandoval state at that time what these papers were?

("Excluded. Allowed to answer.)

"Yes, sir; he did. He kept them in the room where he stayed himself.

"What papers did he state they were?

"They burned papers from the king of Spain, and they burned notes and other documents that he had of debts owed to him from different people.

"Did he speak of burning titles to these lands in controversy?

"He did say they had burned his titles to most of that —right there in the room when I was with him.

"What time did the burning occur?

"I don't know what the date of it was.

"How long was it before his death?

"Four, or five, or six years, at the most, before his death; I am not sure." (Record, 39).

Third. Jose Lueros testifies:

"Did you act as agent and clerk; for how long a time?

"I always lived at his house, and three consecutive years I went to Durango for the purpose of trading sheep.

"What time was that?

"In '40, '1, and '2.

"Under what title did he claim to own and hold that land?

"He claimed it under different titles. I saw one of 1809 and '15, 1807 and '9, and many titles of different years under which he claimed.

"Under what government did he claim title?

"Under the government of Mexico.

"Did he claim to have title by paper or deed, or in what manner?

"He had different titles by purchase.

"Did you ever see any of his titles or grants to lands—to this land—whilst he was in possession of it?

"I did.

"What were they?

"The titles that I saw while he was in possession of this land were conveyances by other citizens to him of this land dated previous to my birthday.

"Did you ever see any title direct from the Mexican government to these lands?

"No, sir.

"Did you ever read any of those titles?

"I did read the titles.

"Did they cover and include this land in controversy?

"They did; yes, sir.

"Now, what has become of these title papers, if you know?

"I do know.

"What became of them?

"They were burned.

"At what period of time?

"I don't remember the date exactly, but it was three or four years after the occupation by the American Government of this Territory.

"Where were they burned?

"In the same room where he resided.

"What were the circumstances of the burning? State all you know about it?

"There were some Americans belonging to the United States band of music that was stationed here at that time; they went down to his house; they did not find Sandoval there at the time; they found his mayor domo; they assaulted the house and broke into the bureau and took some silver coin and took all the valuable things that were in that bureau, and tied up the mayor domo, and set fire to the papers, and tried to burn the mayor domo also.

"Who was the mayor domo?

"Tedoro Lopez.

"Is he the man that testified here this morning?

"Yes, sir.

"Did you see that occurrence?

"I was not there when it actually happened. I saw everything next day.

"What signs did you see next day?

"I saw that the bureau was broken and that they extracted what it contained, and I saw the remains of land papers burned up and a lot of common jewelry." (Record, 40–41.)

It was admitted that the claim of Sandoval had never been presented to any tribunal or officer of the United States for adjudication.

All the documentary evidences of title offered, except the will of Sandoval, and papers relating thereto, bore date in 1879, or subsequent thereto. The oral testimony tended to show that Sandoval and his descendants were in possession of the land for a number of years, probably from the date of the treaty of Gaudalupe Hidalgo.

For the convenience of the court in examining the exhibits of the defendants which were offered to the district court as their muniments of title, we give here an orderly statement of the same, and page of the record where they will be found:

Ex. 1. Deed from Maria Dolores Ledoux to Chas. W. Lewis, purporting to convey a portion of the land, and bearing date August 14, 1879. This deed is executed by Guadalupe Gutierrez, who is described as attorney for said Maria, "as shown by power of attorney dated July 11, 1879." (Rec., 46 & 80.)

Ex. 2. The power of attorney mentioned in Ex. 1, which simply authorizes the attorney to "claim, collect, receive, and discharge all that may be necessary and required in the enforcement of my right, claim, interest, and privilege as heir of the estate," &c. No authority whatever to convey real estate. Instrument dated July 11, 1879. (Rec., 64.)

Ex. O. Bond given by the administrators of the estate of Antonio Sandoval bearing date Feby. 3, 1862. (Rec., 65.)

Ex. P. Oath of the appraiser of the Sandoval estate, dated Feby. 5, 1862. (Rec., 66.)

Ex. Q. Letters of administration issued to the administrators of the Sandoval estate, dated Feby. 3, 1862. (Rec., 66.)

Ex. R. Oath of office of the appraiser of the Sandoval estate, Feby. 3, 1862. (Rec., 67.)

Ex. S. Official oath of the administrators of the Sandoval estate, Feby. 3, 1862. (Rec., 68.)

Ex. V. Inventory of the Sandoval estate made by the administrators Aug. 23, 1865. (Rec., 68 *et seq.*)

Ex. W. Will of Sandoval, dated June 11, 1860. (Rec., 75 *et seq.*)

Ex. Y. Deed from Jesus Baca and his wife to Charles W. Lewis, of a portion of the land, made Jan. 23, 1882. (Rec., 81 *et seq.*)

Ex. Z. An informal, unsealed power of attorney from Maria Quirina Ledoux to Guadalupe Gutierrez, purporting to authorize him to sell her real estate, dated Jan. 21, 1880. (Rec., 84.)

The court denied the offer of the defendants to put these papers in evidence and charged the jury that there was no question of fact to submit to them, and directed a verdict for the plaintiff for the amount paid by him for the land in question, to wit, $5,333.33.

The case then went on appeal to the supreme court of the Territory. That court, ignoring all other questions in the case, held that, as the deed from the defendants to the plaintiff contained words of warranty, the effect was to deny to the plaintiff the benefit of the statutory covenant of seisin, and ordered that the judgment below should be reversed and the case dismissed.

The plaintiff below thereupon appeals to this Court and sends up with the record the following assignment of errors:

1. The court below, the supreme court of the Territory of New Mexico, erred in its opinion and decision upon the record in said cause in reversing the judgment of the district court of the second judicial district in and for the county of Bernalillo in said Territory.

2. The court erred in dismissing or ordering to be dismissed the said action and in not remanding the same.

3. The said court erred in its opinion and decision in said cause in deciding and adjudging that the covenant of warranty, written and contained in the deed of conveyance in evidence executed by defendants in error to plaintiff in error, limited, restricted, or restrained the legal effect and operation of the covenant created and implied by the statute of said Territory, and by force of said statute incorporated into said deed of conveyance.

4. The said court erred in dismissing and in not remanding the said cause, with leave to plaintiff to amend his declaration as he might be advised, or for further proceedings in accordance with said decision.

5. The said court erred in its decision that said defendants in error, by pleading over to plaintiff's declaration after their demurrer thereto had been overruled, did not waive their said demurrer.

6. The said court erred in overruling the motion of the plaintiff in error for a rehearing of the said cause upon the grounds in said motion set forth.

7. The judgment and decision of the said court upon the record in said cause was in favor of the defendants in error, and dismissed the said action and reversed the judgment of said district court when the same should have been in favor of plaintiff in error, and said judgment rendered by said district court should have been affirmed. (Rec., 99 *et seq.*)

We may assume, without further statement or argument, that the defendants in error failed to tender any proof to the District Court to sustain the averment of their plea that they "were lawfully seized of an indefeasible estate, and in possession of a title in fee-simple in and to the said real property, and then had good right and full power to convey the same."

The record shows their utter failure in that regard; the supreme court of the Territory recognized this and placed its finding on other grounds; and the counsel, as we understand, is making no claim that the proffered proof would have been sufficient to show title in their clients.

The case is here to be argued on law points, and we state our position in the following propositions:

1. The covenant of warranty which is found written in the deed does not exclude the statutory covenants. These latter must be considered as express covenants, having the same effect as though written out in full in the instrument of conveyance.

2. The statutory covenant of seisin is a general covenant, unlimited by any restrictive words found in the second statutory covenant.

3. The covenant of seisin is broken, if at all, as soon as it is made.

4. The plaintiff is only required to declare its breach, and need neither aver eviction or damages.

5. The burden of proof is on defendant.

6. The measure of damages is the purchase money and interest.

I.

Our first point is that the warranty found in the deed does not exclude the statutory covenants, but that these

latter must be considered as express covenants, having the same effect as though written in full in the instrument.

The territorial law referred to we have given in full on page — of this brief. The supreme court of the Territory, in the case at bar, pass upon the validity of this act. In the opinion, found on pp. 101 *et seq.*, they set out the act, give construction to some ambiguous words and phrases, and declare it valid. It is stated that the Legislature undertook to pass the act as a copy of a Missouri statute; that the enactment was in the Spanish language and has since undergone several translations into English. In this way the court accounts for the uncertainty and obscurity of some of the words. But as a final conclusion the court gives the words the force and effect of the language found in the Missouri statute, found on page — of this brief.

Holding this valid law in hand, we find a deed containing the words "bargained and sold, or words to that effect," and the question presented is, shall it be construed to contain the express covenant (as given in the language of the statute) "on the part of the grantor for himself and his heirs, to the grantee, his heirs, and assigns: First, that the grantor was, at the time of the execution of such conveyance, seized of an indefeasible estate, in fee-simple, in the real estate thereby granted."

The law itself provides one exception where a deed containing the words "bargained and sold" shall not be construed as containing the covenant of seisin, that is, where such covenant is restrained by expressed terms contained in the instrument. There is no contention that the deed in question is subject to this exception.

The sole ground upon which the court below reversed the judgment of the District Court was that the words of warranty found in the deed excluded the operation of the statute.

The statute in question having been construed by the territorial court as identical in effect with the Missouri statute from which it was copied, we naturally turn to the decisions of the latter State for an interpretation of the law.

The leading case is *Alexandria* v. *Schreiber* (10 Mo., 460). This case, in its material aspects, is similar to the one before the Court. It was an action on the covenant of seisin. The deed contained the words "bargained, sold," &c., and also a general covenant of warranty, the covenant of seisin only being operative, if at all, by reason of the statute. The plaintiff obtained judgment for purchase money, with interest. The only question discussed by the supreme court of the State, to which the defendant appealed, was the construction and effect of the statute. The second point made by the counsel for the appellant was that the express covenant to warrant and defend, found in the deed, abrogated all implied (statutory) covenants.

The court gives the text of the Missouri statute, and shows how it materially differs from the Pennsylvania statute. It points out that the three covenants in the Missouri act are separate, distinct, and independent of each other; the first and third being general, the second special, but neither limiting or restraining either of the others; while in the Pennsylvania act all three of the covenants provided for are construed as being limited to the acts of the grantor and those claiming under him. The court examines the leading cases, including *Browning* v. *Wright* (2 Bos. & Pull., 14), *Howell* v. *Richards* (11 East., 633), and *Benden* v. *Fromenger* (4 Dall. R., 436), and cites *Funk* v. *Ex'rs of Bechtoll* (11 Serg. & Rawle, 109) as a case where a similar question arose, being an action of covenant upon the covenant implied by the words "grant, bargain, and sell," there being in the same deed a cove-

nant of special warranty, and where it was held that the covenant of special warranty did not restrain the implied covenants.

The opinion closes with the following words:

"It is apparent from these cases, to which we have briefly referred, that whilst it is conceded that a special covenant will restrain a general one, where the two are absolutely irreconcilable, yet the courts have inclined very much to let both stand. A covenant is to be construed most strongly against the covenantor, and in giving effect to the intention of the parties to an instrument of conveyance, the courts have kept this principle in view. Where the particular covenants and the general covenants are entirely independent of each other, and of a different character, they will all stand. The statute enumerates the three covenants which the words 'grant, bargain, and sell' are declared to imply as distinct and independent covenants. The second may be superfluous, but it does not therefore limit the first, which is independent of and inconsistent with it."

Under their statute, following the principles announced in this case, the Missouri courts seem to have uniformly held (1) that the three covenants provided by their statute were independent of each other; (2) that where the deed used the words "grant, bargain, and sell" the covenants had the same effect as though written into the conveyance, and (3) that they were not excluded or abrogated by the covenant of warranty having been written in the deed by the parties thereto, whether such covenant was general or special.

Another case very closely in point is that of *Brown* v. *Tomlinson* (2 Greene, 525). The State of Iowa had, at the time the deed then in question was executed, a statute in the exact words of the Missouri act. The deed, as in the case at bar, contained a covenant of warranty, but not the

covenants of seisin, &c., except as they were made a part of it by force of the statute. A distinction to be noted, however, is that in that case the warranty in the deed was a limited, special warranty, while in this case it is a general warranty. Now, whether this covenant of warranty, written in the deed, was a limitation or restraint upon the statutory covenants, was the very question discussed and passed upon by the court, whose language is as follows:

"Does the special covenant at the end of the deed, in which the grantor warrants against all claims for or under him, limit and explain the more general and extended warranties which are covenanted by the words, 'grant, bargain, or sell?' The decision in the court below shows that this question was necessarily decided in the affirmative. Independent of the statute and under the assumption that the words of conveyance contained only *implied* covenants incompatible with that stipulated by the special warranty, the correctness of that decision could not be controverted. But our statute regulating conveyances enters largely into the covenants of this deed. The sixth section of that act (*Rev. Stat.*, 204) declares that the words 'grant, bargain, and sell,' in all conveyances, shall, unless restrained by express terms, be construed to be the following express covenants." (Here follows the act, which is in exactly the words of the Missouri statute).

"The construction to be given to this language is obvious; there is no room for ambiguity or doubt. Those words of conveyance are to be considered as something more than an implied warranty; they are to be regarded as express covenants and are to have the same bearing before a court, the same legal construction as they would if specially set forth in the conveyance, unless restrained by express terms. A restraint by implication will not suffice; it must be positive, it must be expressed; or, according to the statute, the covenants may be sued upon in the same manner as if they were expressly inserted in the conveyance. Now, the question presents itself, are not those covenants of seisin and of freedom from encumbrance, as

expressed by the words of the conveyance, perfectly compatible with the special warranty against the claims of all persons from or under the grantor? Though the latter and more limited covenant may be mainly comprised within the former, it is still perfectly reconcilable with them, and as they are in no way restrained or excluded by express words in the deed, we can come to no other conclusion than that the covenants which were expressed by virtue of the statute, which enters into the conveyance, should co-exist and operate with that which is especially set forth in the deed."

"But it is urged that the third covenant is unnecessary, unless applied as a limit to the first and second. If unnecessary it does not follow that it should be adjudged inconsistent with the antecedent covenants, or that they are restrained by it, when no word or term is expressed which can denote such intended limitation."

Upon this point the court quotes *Hesse* v. *Stevenson* (3 Bos. & Pull., 565), *Gainsforth* v. *Griffith* (1 Saund., 59), *Smith* v. *Compton* (3 Bar. & Ald., 189), *Hawell* v. *Richards* (11 East., 633); also 2 Ala., 535; 7 Mass., 68; 11 Serg. & R., 109; 10 Mo., 460, and other cases, and concludes:

"But in this case the covenants are not inconsistent, although in part superfluous, and as our prevailing law, the statute, has given peculiar effect to the words, 'grant, bargain, and sell,' it cannot be abated by mere implication, nor by the authority of decisions made where no such statute was in force. These words of conveyance create something more than implied covenants, as we have seen; they are declared to be express, the same as if specially mentioned, and in their very nature they become special as well as general covenants, (*Gratz* v. *Ewalt*, 2 Binney, 95), and they are to have full effect, 'unless restrained by express terms contained in such conveyance.' Such is the explicit direction of the statute, and the parties must be presumed to have known the law, and to have made their covenants accordingly. And as the covenantor made

them without any express limitation, to enforce one by implication would do violence to the intention of the parties, and prevent the obvious letter of the statute."

In *Carver* v. *Louthain* (38 Ind., 530) the court held, as to a statute somewhat similar, that the covenants should be "regarded and treated as though they were incorporated in the deed. They constitute a part of the deed as though they were written therein." And this position was repeated and affirmed in *Kent* v. *Cantrall* (44 Ind., 316).

In *Bush* v. *Person* (18 How., 82) the high court of appeals of Mississippi had decided "that though the deed of mortgage contained no express covenant of warranty, the words, 'grant, bargain, and sell,' which were in the deed, under the law of that State, imported covenants of warranty of title, and against encumbrances for quiet enjoyment, *as effectually as though such covenants had been expressly set out in the deed.*"

II.

It is thus clear, we think, that the covenant of warranty found in this deed does not exclude the statutory covenants, but that the latter must be considered as if written in the instrument.

Our second point is that the statutory covenant of seisin is a general covenant, unrestricted by words found in the second statutory covenant.

Only a portion of our States have laws providing for statutory covenants in conveyances of real estate where the words "grant, bargain, and sell" are used. Pennsylvania passed the first act of this kind. It was obviously borrowed from an old English statute (6th Anne) which rapidly fell into disuse and was repealed, and concerning which we find no important decisions. Illinois, Indiana,

Iowa, Alabama, Mississippi, Arkansas, and Missouri, either have now or at some time have had laws of this character. These laws differ considerably in the different States, the two types being the present Pennsylvania act and the present Missouri act. The Iowa law, which has been repealed, was an exact copy of that in Missouri. Most of the other States named have patterned after Pennsylvania. As the decisions of the State courts, which we are compelled to use in the argument, refer to the particular State law in question, we print here the two typical statutes side by side for convenient examination:

Brightly's Purdon's Digest (Pa.):

"SEC. 75. All deeds to be recorded in pursuance of this act, whereby any estate of inheritance in fee-simple shall hereafter be limited to the grantee and his heirs, the words *grant, bargain, sell,* shall be adjudged an express covenant to the grantee, his heirs and assigns, to wit, that the grantor was seized of an indefeasible estate, in fee-simple, freed from incumbrances done or suffered from the grantor (excepting the rents and services due to the lord of the fee), as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed; and the grantee, his heirs, executors, administrators, and assigns, may, in any action, assign breaches, as if such covenants were expressly inserted: *Provided always,* That this act shall not extend to leases at rack-rent, or to leases not exceeding one and twenty years, where the actual possession goes with the lease."

General Stats. of Missouri, p. 444, Sec. 8:

"The words 'grant,' 'bargain,' and 'sell,' in all conveyances in which any estate of inheritance in fee simple is limited, shall, unless restrained by expressed terms contained in such conveyances, be construed to be the following express covenants on the part of the grantor, for himself and his heirs, to the grantee, his heirs and assigns: First. That the grantor was, at the time of the execution of such conveyance, seized of an indefeasible estate, in fee-simple, in the real estate thereby granted. Second. That such real estate was, at the time of the execution of such conveyance, free from incumbrances done or suffered by the grantor, or any person claiming under him. Third. For further assurances of such real estate to be made by the grantor and his heirs to the grantee and his heirs and assigns; and may be sued upon in the same manner as if such covenants were expressly inserted in the conveyance."

It will readily be seen by a glance at the Pennsylvania act why her supreme court in Gratz *v.* Ewalt (2 Binney, 95) held that the covenant of seisin was limited to the acts of the grantor and those claiming under him. The words

" done or suffered from the grantor " are readily construed as limiting each of the covenants named. The court does not hold in that case, which is the leading one in the construction of the Pennsylvania act, that the covenant against encumbrances, or the covenant for quiet enjoyment, is a limitation upon the covenant of seisin, but does hold that each of the covenants provided for are limited by the restraining words used. This is essentially different from the position taken by the defendants in error, namely, that the general covenant of seisin is restrained by the limited covenant as to encumbrances.

Turning to the Missouri statute it will be seen that the three covenants enumerated are, in the language of her court in *Alexander* v. *Schreiber*, " distinct and independent covenants." The first, the covenant of seisin, and the third, the covenant for further assurances, are general; the second, as to encumbrances, is limited to acts " done or suffered by the grantor, or any person claiming under him."

Now, the supreme court of the State has held, in the case just cited, that the second covenant " may be superfluous, but it does not therefore limit the first, which is independent of and not inconsistent with it."

The leading case upon the subject of one covenant being restrained by another is *Browning* v. *Wright* (2 Bosanquet & Puller, 13). In that it was urged by counsel that the demurrer could not be allowed without laying down the principle that any special covenant in a deed will restrain all the general covenants. The court replied that if that consequence would necessarily ensue then the demurrer should not be sustained. But the court added, " the question is not whether a special covenant will restrain a general one, but whether the particular covenant on which the action is founded be general or special."

And the court found, from certain limiting words used, that the covenant was a limited one. It was not limited or restrained by another covenant, but was limited by words that applied to it as well as applying to the covenants in the deed.

The court in that case, commenting on the case of *Gainsforth* v. *Griffith* (1 Saund., 60), says that in that case the first covenant was for an indefeasible title and was a separate and distinct covenant; and the second was for quiet enjoyment, notwithstanding the assignor's acts.

* * * "The nature of the assurance shows it to have been the intent of the parties that the words in the last covenant should not attach upon the first."

In other words, the case of Browning *v.* Wright turned upon the construction of one covenant and not upon the effect of one covenant upon another.

In *Duval* v. *Craig* (2 Wheat., 45) the deed declared upon contained a limited covenant that the premises were free from encumbrances, *i. e.*, limited to the acts of the grantors, and further contained a general covenant of warranty, with indemnity, in case of losses, to be paid in lands of equal quantity and quality, &c.

It was urged upon the court that these two covenants were so knit together that they were to be construed in connection. Justice Story, delivering the opinion of the court, says: "The covenants stand distinct in the deed, and there is no incongruity or repugnance in considering them as independent of each other. * * * The case ought to be a very strong one which should authorize a court to create, by implication, a restriction which the order of the language does not necessarily import or justify. It ought to be one on which no judicial doubt could exist of the real intention of the parties to create such a restriction.

Rawle (on Covenants, &c., sec. 288) quotes approvingly Sugden's rules, deduced from all the authorities, as to the effect upon covenants by other covenants found in the same instrument. The second and fourth rules are as follows:

Second. Where the first covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant, unless an express intention to do so appear, or the covenants be inconsistent.

Fourth. Where the covenants are of divers natures, and concern different things, restrictive words added to one shall not control the generality of the others.

Rawle further remarks, in section 290, that "when the limited covenants belong to a different class, or rather have a different object from the unlimited ones, they will be held to produce no effect upon each other, and the former will not qualify the latter."

See *Peters* v. *Grubb*, 21 Pa., 460.
Rowe v. *Heath*, 23 Tex., 619.
Morrison v. *Morrison*, 38 Ia., 73.
Summers v. *Williams*, 8 Mass., 162.

From the foregoing we conclude that the general covenant of seisin provided for by the law of the Territory will not be held as restricted by the limiting words of the second covenant named in that act.

III.

If our claims that the covenant of warranty found in the deed does not exclude the statutory covenants, and that the general covenant of seisin is not restricted by the limited covenant as to encumbrances, are well taken, then we have a deed from our grantor containing four covenants,

as follows: First, a general covenant of seisin; second, a limited covenant as to encumbrances; third, a general covenant as to further assurances, and fourth, a general covenant of warranty.

We therefore make the third point that the covenant of seisin is broken, if at all, as soon as it is made.

Rawle, page 76, section 60, after an exhaustive examination of the cases touching this point, remarks: "It may be observed of these cases that if, as the weight of authority proves, a covenant for seisin is satisfied only by the transfer of an indefeasible title, it is technically broken as soon as it is made if the title be from any cause defeasible." Again, on page 303:

"The weight of American authority is unquestionably in favor of the position that the covenant for seisin being broken, if at all, at the instant of its creation, is thereby turned into a mere right of action, incapable of assignment, and consequently of being used by any but the covenantee or his personal representative."

Citing in a foot note numerous cases from nearly all the State courts.

See, in addition, *Lot* v. *Thomas*, 1 Pennington, ——; *King* v. *Gilson*, 32 Ill., 348; *Fitzhugh* v. *Crogham*, 2 J. J. Marshall, ——; *Ross* v. *Turner*, 2 English, 132.

In *Abbot* v. *Allen* (14 Johns., 247), Judge Platt, announcing the opinion of the court, says:

"The marked distinction between a covenant of seisin and those for quiet enjoyment and general warranty consists in this: that the covenant of seisin, if broken at all, must be so at the very instant it is made; whereas, in the latter covenants, the breach depends upon the subsequent disturbance and eviction, which must be affirmatively alleged and proved by the party complaining of the breach. A grantor who gives either of these covenants is not bound

to deliver to his grantee the prior deeds and evidences of his title. The legal presumption therefore is, that they retain or can produce the evidence of that title, if any. The grantee relied on that covenant; and until the grantors disclose their title, he holds the negative merely, and is not bound to aver or prove any fact in regard to an outstanding title. *Prima facie*, the grantee is to be presumed ignorant of the real state of the title. The grantors are not bound, unless by suit, to explain their title. It is enough that the grantee suspects the grantor's title to be defective; he is not bound to wait in suspense until by possibility he can find out in whom the title really is."

In *Moore* v. *Merrill* (17 N. H., 75):

"Covenants of seisin, and against encumbrances, are covenants of things existing at the time they are made. If broken at all, they are broken at the moment they are made. A cause of action then exists, which does not pass by force of any conveyance purporting to grant the premises."

Also see *Logan* v. *Moulder* (1 Ark., 313), cited below, as to the burden of proof and measure of damages.

IV.

The plaintiff, in an action on the covenant of seisin, need only declare the breach, but is not required to aver either eviction or damages.

As to the necessity of declaring an eviction, it seems to us the question is permanently settled by the highest authority, found in a decision of this Court. (*Pollard et al.* v. *Dwight et al.*, 4 Cr., 421.)

This was an action on the covenant of seisin where the plaintiffs set out the covenant and assigned the breach as follows: "That they (the defendants) were not, nor were any or either of them, lawfully seized and possessed of any

estate whatever in the said land and premises, nor in any part thereof, nor had the said Pollard and Pickett, or either of them, good right and lawful authority to sell and convey the said land and premises as aforesaid."

And the defendants pleaded that they were, at the date of the deed, "well seised and possessed of the said land, and had good right to bargain and sell the same, in manner as alleged in the said deed, and so they have kept and performed their said covenants, and of this put themselves on the country."

One of the errors assigned on appeal was that the declaration was insufficient to sustain a judgment in that it did not aver an eviction.

Upon this point Chief-Justice Marshall, who announced the opinion of the court, said:

"Another objection taken to the declaration is, that it ought to have alleged a disseisin of the plaintiffs below, in order to enable them to maintain their action. * * * This leads to the inquiry whether the covenant of the vendors can be broken, as stated in the declaration, although no eviction has taken place; and the court is of opinion that it may be so broken. (9 Co., 60.)"

"The covenant is that the vendor is seised in fee of the premises which he sells and conveys. Suppose the fact to be that he had no title, nor pretence of title, to those premises; that he had conveyed lands for which he had never received a patent or a title of any kind. Could it be said that his covenant that he was seised in fee remained unbroken until the real proprietor should think proper to eject the vendee? This question, in the opinion of the court, must be answered in the negative."

Also see *Mitchell* v. *Hazen*, 4 Conn., ——; *Hamilton* v. *Wilson*, 4 Johns., 72; *Lot* v. *Thomas*, 1 Pennington, 407; *Pringle* v. *Wittens*, Ex'r, 1 Bay., 254; *Shaw* v. *Anderson*, 7 Serg. & R., 43.

Seisin is a *nomen generalissimum*, and means *ex vi*

termini, the whole legal title, and a covenant of seisin is consequently broken if the covenantor have not the possession and the right or legal title. Fitzhugh *v.* Croghan (2 J. J. Marshall, ——; Dickson *v.* Desire's Admr., 23 Mo., 151.)

Chief-Justice Parsons, in Prescott *v.* Trueman (4 Mass., 629), declares that eviction is not necessary to enable the grantee to bring action on the covenant of seisin, and remarks: "If we are mistaken in the law, the grantee can have no remedy on the usual covenants in our deeds of conveyance until he is evicted. In the meantime he may be unwilling to make improvements; and when he is evicted, the grantor may be unable to make him any compensation."

Rawle, in sec. 62, lays down the doctrine that it is well settled that in an action on the covenant for seisin it is unnecessary either to aver an eviction in the declaration or lay any special damages, nor set forth the particulars of the paramount title.

He quotes the language of Judge Platt in *Abbott* v. *Allen*, *supra*, as follows:

"All that is incumbent on the plaintiff is to negate the title of the defendants, who affirmatively and generally aver that they had a good title, and the general replication is sufficient. * * The question is merely whether the defendants had an indefeasible title, and the only evidence in relation to that title may be exclusively in the power of the defendants."

The authorities to the same effect are numerous.

V.

The burden of proof is on the defendant.

Rawle, sec. 65, states the rule:

"As respects the burden of proof, it is settled that the rule as to the evidence corresponds with the rule as to the pleadings, and in the absence of statutory changes in the common law system of pleading, the knowledge of the state of the title being supposed to vest with the defendant, he is bound in the first instance to maintain the affirmative of his covenant. It is considered that until the grantor discloses his title the plaintiff holds the negative merely, and is not bound to aver or prove any fact in regard to the outstanding title. Hence, if upon the trial of the issue neither party offer any evidence, the plaintiff is entitled to judgment."

The author cites uumerous cases, and, among them, *Swofford* v. *Whipple* (3 G. Greene, 261), where the question, in a case very similar to the one at bar, is fully discussed. The issue there joined was exactly as in this case, and the court, in the course of delivering the opinion, says :

"The next point raised is that the court erred in deciding that upon the issue joined the burden of proof lay upon the defendant, that he held the affirmative, and must first introduce evidence to sustain the issue, and that plaintiff was not bound to prove that the defendant had not kept his covenants as stated in the declaration.

"It is a well settled rule of evidence that the party who alleges shall prove the affirmative of any proposition. Ordinarily the issue lies upon the plaintiff, and the *onus probandi* is on him to establish what he affirms. But it frequently happens in making up an issue, the defendant assumes the affirmative proposition, or confesses and seeks to avoid the action, and would fail if no evidence in avoidance should be adduced by him. In such event, the proof is incumbent on the defendant as the party who would fail if no evidence should be given on either side, or as the party who has thrown a negative proposition on the plaintiff, which might be difficult and perhaps impossible for him to prove, and in relation to which the defendant has all the evidence in his possession. Hence it is laid

was deemed that the rents should be set off against interest.

In the case at bar the damages found were simply the purchase money, the court probably having this modification of the rule in view.

The Order of Dismissal.

The court below reversed the judgment of the district court and directed that the cause should be dismissed. This was manifestly error.

The record discloses an utter failure to prove title in the defendants in error. It also shows that the United States, in the exercise of a paramount title, have taken possession of the land, surveyed it, contracted to sell a portion, and granted away another portion. The declaration, of which the deed was made a part, shows a full covenant of warranty on the part of the grantors. At most, therefore, the case should have been sent back to the district court for further proceedings, that the plaintiff might have amended his declaration and had his remedy under the general covenant of warranty.

The order made would needlessly multiply suits and costs and serve no good purpose.

Then, in conclusion, our deed having the legal effect of a general covenant of seisin written therein, and the defendants failing to show title in themselves, the district court properly charged the jury to bring in a verdict for the purchase-money.

J. H. McGOWAN,
AND C. W. HOLCOMB,
Atty's for Appellant.

IN THE

Supreme Court of the United States.

WALLACE DOUGLASS, Plaintiff in Error,
vs.
CHARLES W. LEWIS and JESSIE A. LEWIS, his Wife.
No. 226.

Brief for Appellees, Lewis and Wife.

FACTS.

1. The action below was on a covenant of seisin, declaration filed September 11th, 1883. (R., 2 and 3.)

2. The declaration makes the deed on which the action of covenant is based part of itself; which deed is found in full in record pages 44–45; and it, as will be observed, contains no covenant of seisin in express words, and does contain a covenant by which the grantors each covenant that the grantors "shall and will warrant and defend these presents forever" unto the second party, to wit, the grantees, their heirs and assigns, against the parties of the first part, their heirs and assigns, and against all and every person and persons whomsoever lawfully claiming or to claim the same or any part thereof.

3. The plaintiffs relied, in suing upon the pretended and alleged covenant of seisin, as set out in the declara-

tion (R., 3), upon the statute of the Territory (Compiled Laws of 1854, section 2750) as found in the record at page 102, as a statute whose operation and legal effect is claimed to have introduced into the deed the said covenant of seisin by its own operation and vigor.

4. Two demurrers (R., 5 and 7) were filed to the declaration, both of which were overruled. (R., 8.)

5. Pleas were filed to the declaration on the 1st of October, 1883, (R., 5,) one alleging that the deed was not defendants' deed; the other denying the averment that defendants covenanted with the plaintiff that they were lawfully seized.

A further plea that it was not true that the property conveyed was not the property of defendants.

Further plea denied that expenditures were made by plaintiffs on said premises as averred.

Further plea says that it is not true that defendants had not kept their covenants.

Further pleas were filed at the May term, 1884, by defendant (R., 10 and 11) alleging, in the first plea that, at the time of making the deed, the grantors were seized and possessed of the said real estate with full power and authority to convey according to the effect of the deed. The second plea is, that at the time of making the said deed the grantors "were lawfully seized of an indefeasible estate and in possession of a title in fee simple in and to the said real property, and then had good right and full power to convey the same according to the form and effect of said deed."

6. The first additional plea, found page 10 record, was demurred to; and as to the second plea, found at the top page 11 record, *issue was joined.* (R., 11.) And on this issue alone the case was tried.

7. The demurrer to the first additional plea, on page 10, was sustained. (R., 12.)

8. The trial to the jury was had upon the issue joined on the plea at the top of page 11.

9. The verdict of the jury is on page 85, for $5,333.33⅓.

10. The bill of exceptions sets out all the evidence and rulings, &c., and extends from page 20 to page 88.

11. The court took the case from the jury and directed it to return a verdict for the amount for which the verdict was returned. (R., 43.)

12. Motion for a new trial by the defendants below, found page 85. Also motion in arrest of judgment, found page 87.

The assignment of errors by the defendants in error, found page 89, furnish a good index to all the material steps in the trial, all the questions raised by the defeated party, and need not be here repeated.

It will be seen by the record, and especially by the charge of the court to the jury, (R., 43), that the court excluded from the consideration of the jury all the evidence in the case, the court remarking:

"There is no question of fact in the case for you to pass upon. There are only questions of law which it is the duty of the court to pass upon, and the entire responsibility of passing upon such questions is with the court.

"The court instructs the jury that it is their duty under the law and evidence in this case to find a verdict for the plaintiff and assess his damages at the amount of $5,333.33, being the amount of money paid by him for the land in question."

Judgment was rendered on this verdict for the said amount. (R., 13.) The case was carried by appeal to the Supreme Court of the Territory. (R., 17.) The Supreme Court, in deciding the case, did not consider any of the assignments of error, found at page 89 of the record, except two, the fourth and the eighth, (see opinion, page 101); the fourth being that the court erred in overruling the defendants' motion and grounds for a new trial and in arrest of judgment; and the eighth being, that the court erred upon the said trial in directing a verdict in this case for the plaintiff against the remonstrance of the defendants in any amount whatever, there being no sufficient evidence to support said verdict.

It will be seen by reference to the opinion of the Supreme Court that the point upon which the case turned was whether, under the statute of the Territory, found page 102 of record, such statute had the effect of introducing into the deed of the appellees, found page 44 of record, and which contains said covenant of warranty, the additional covenant of seisin, amounting to a covenant, as set fourth in the declaration, (R., 3), that "at the time of the execution of the said conveyance they, the said defendants, were lawfully seized of an indefeasible estate and in possession of a title in fee simple in and to said property, and then had good right and full power to convey."

In the opinion by the District Court below (R., 10) it will be seen that that court held what it expresses in these words:

"In the case at bar I am of opinion that the express covenant of warranty is independent of the covenant of seisin implied by the statute, and that an action may be maintained upon the latter, and can only be met by a plea of good title in the grantor at the time of the execution of the deed."

On the other hand, the Supreme Court of the Territory held, as is expressed in its opinion, (R., 104, folios 86–87), that the effect of the introduction, into the deed, of an express covenant of warranty is "to deny to a purchaser the benefit of the statutory covenant of seisin when he has also received an express covenant of warranty. And under such circumstances there could be no recovery without eviction. The court says:

"As there is no pretense, in this case, of an eviction or any claim whatever of a breach of the covenent of warranty, it follows that the action cannot be maintained, and that it was error in the court below to order a verdict for the plaintiff and in overruling the motion in arrest of judgment."

We here introduce from the statutes of each of the States which have made provision like that contained in section 2750, of the Compiled Laws of New Mexico, exact copies of said sections from the laws of each State—this as a matter of convenience to the court in appreciating the force of the decisions of the States which we cite below construing these statutes respectively.

Brightly's Purdon's Digest (Pa.):

"SEC. 75. All deeds to be recorded in pursuance of this act, whereby any estate of inheritance in fee-simple shall hereafter be limited to the grantee and his heirs, the words *grant, bargain, sell* shall be adjudged an express covenant to the grantee, his heirs and asisgns, to wit, that the grantor was seized of an indefeasible estate, in fee-simple, freed from incumbrances done or suffered from the grantor (excepting the rents and services due to the lord of the fee), as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed; and the grantee, his heirs, executors, administrators, and assigns, may, in any action, assign breaches, as if such covenants were expressly inserted: *Provided always*, That this act shall not extend to leases at rack-rent, or to leases not exceeding one-and-twenty years, where the actual possession goes with the lease."

Code of Alabama, 1876, p. 573, § 2193:

"In all conveyances of estates in fee, the words 'grant, bargain, sell,' or either of them, must be construed (unless it otherwise clearly appear from the conveyance) an express covenant to the grantee, his heirs and assigns, that the grantor was seized of an indefeasible estate in fee-simple, free from incumbrances done or suffered from the grantor, except the rents and services that are reserved; and also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by the express words of such conveyance; and the grantee, his heirs, personal representatives, and assigns, may, in any action, assign breaches, as if such covenants were expressly inserted."

Rev. Code Mississippi, p. 345, § 1196:

"The words 'grant, bargain, sell,' shall operate as an express covenant to the grantee, his heirs and assigns, that the grantor was seized of an estate free from incumbrances, made or suffered by the grantor, (except the rents and services that may be reserved,) as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in the conveyance; and the grantee, his heirs, executors, administrators, and assigns, may, in any action, assign breaches, as if the covenants above mentioned were expressly inserted."

General Stats. of Missouri, p. 444, sec. 8:

"The words 'grant,' 'bargain,' and 'sell,' in all conveyances in which any estate of inheritance in fee-simple is limited, shall, unless restrained by expressed terms contained in such conveyances, be construed to be the following express covenants on the part of the grantor, for himself and his heirs, to the grantee, his heirs and assigns: First. That the grantor was, at the time of the execution of such conveyance, seized of an indefeasible estate, in fee-simple, in the real estate thereby granted. Second. That such real estate was, at the time of the execution of such conveyance, free from incumbrances done or suffered by the grantor, or any person claiming under him. Third. For further assurances of such real

estate to be made by the grantor and his heirs to the grantee and his heirs and assigns; and may be sued upon in the same manner as if such covenants were expressly inserted in the conveyance."

R. S. Illinois, 1881, p. 308, Rec. 8:

"In all deeds whereby any estate of inheritance, in fee-simple, shall hereafter be limited to the grantee and his heirs, or other legal representatives, the words 'grant,' 'bargain,' and 'sell' shall be adjudged an express covenant to the grantee, his heirs, and other legal representatives, to wit: That the grantor was seized of an indefeasible estate in fee simple, free from incumbrances done or suffered from the grantor, except the rents and services that may be reserved, as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed; and the grantee, his heirs, executors, administrators, and assigns, may in any action assign breaches, as if such covenants were expressly inserted: *Provided always*, That this law shall not extend to leases at rack-rent, or leases not exceeding one-and-twenty years, where the actual possession goes with the lease."

R. S. Arkansas, 1848, p. 264:

"The words grant, bargain, and sell shall be an express covenant to the grantee, his heirs and assigns, that the grantor is seized of an indefeasible estate in fee simple, free from incumbrances done or suffered from the grantor, except rents or services that may be expressly reserved by such deed, as also for the quiet enjoyment thereof against the grantor, his heirs and assigns, and from the claim or demand of all other persons whatsoever, unless limited by express words in such deed. The grantor, his heirs or assigns, may in such action assign breaches as if such covenants were expressly inserted."

R. S. Indiana, 1881, sec. 2927:

"Any conveyance of lands worded in substance as follows—'A B conveys and warrants to C D [here describe the premises] for the sum of [here insert the con-

sideration]'—the said conveyance being dated, and duly signed, sealed, and acknowledged by the grantor, shall be deemed and held to be a conveyance in fee simple to the grantee, his heirs and assigns, with covenant from the grantor for himself and his heirs and personal representatives that he is lawfully seized of the premises, has good right to convey the same, and guarantees the quiet possession thereof; that the same are free from all incumbrances, and that he will warrant and defend the title to the same against all lawful claims."

BRIEF.

Although we think there were many errors in the rulings of the District Court, upon which this judgment might have been reversed by the Supreme Court of the Territory, yet in this brief we will, in the main, confine it to these three questions raised by the record:

1st. Since the plaintiff in error took from his grantor, defendant in error, an express covenant of warrantry (R. 44), does that fact waive, and exclude from the operation of said deed, the statutory and implied covenant of seisin provided for in section 2750 of Compiled Laws? (R., 101.)

2d. Is it not the true construction of said section 2750 that the covenant of seisin therein provided for is, in its operation, *limited* to covenanting against all defects of title "made or suffered to be made by the grantor or by any person claiming the same under him?"

3d. If neither of the preceding propositions is sustained, and, in the alternative, if there be an implied covenant of seisin covering *all* defects of title, then, in a case like the present, where there has been neither eviction, disturbance of possession, demand by the covenantee to make good the title, nor any offer to surrender possession, nor demand by third persons of possession made against the grantee, can there be any recovery beyond nominal damages?

I.

Our first point is, that if the law of the case was such that an actual eviction must be shown in order to recover in an action of covenant upon this deed, found at page 44, then the court did not err in *dismissing* the suit, as the Supreme Court did (R., 94), instead of simply reversing the judgment and allowing it to stand for further trial in the District Court; and which order to dismiss is assigned in this court (R., 99, 100), in assignment 2 and assignment 4, as error in the Supreme Court.

We submit that this is so, because it will be seen by the testimony of both parties, and by all the testimony, that there was, and could be, no pretense of any eviction such as is necessary in order to maintain the action of covenant on a covenant of *warranty* of title, as distinguished from a covenant of seisin. It was admitted by Douglass himself, and shown by all the testimony bearing on that point, that at the time of bringing the suit, and at the time of the trial, and at all times after possession taken by Douglass, Douglass was in peaceable, unchallenged, and undisturbed possession of the premises sued for. (See folio 38, R., 21.) And hence, if this deed contains no covenant of seisin, and nothing but the express covenant of warranty, found at the bottom of page 44, then to send the case back for trial below upon an amended declaration would have been, as this court can see, only subjecting the party to vain litigation and unnecessary cost, since no amendment could be made to the declaration under the admitted facts, which would be of any avail to the plaintiff.

Although we do not deem it now material, yet it may not be amiss to here notice, in passing, the point made for the plaintiff, at folio 161, 162, and which point will probably be repeated in this court, to wit, that the defendants, by not standing on their demurrer to the declara-

tion, and by pleading over, have waived the objection to the declaration that it fails to aver the eviction necessary to recovery on a covenant of warranty. We suppose that this point for the plaintiff means that this waiver enables the plaintiff in a new trial on the present or an amended declaration to recover upon the covenant of warranty.

This, we submit, is a mistake of law on the part of the plaintiff. We understand the law relating to this matter of alleged waiver to be accurately expressed by this court in the following words from—

Teel *v.* Walker, 111 U. S., 246,

where the court says:

"When the declaration fails to state a cause of action, and clearly shows that upon the case as stated the plaintiff cannot recover, and the demurrer of the defendant thereto is overruled, he may answer upon leave and go to trial, without losing the right to have the judgment upon the verdict reviewed for the error in overruling the demurrer. The error is not waived by answer, nor is it cured by verdict."

II.

Next, we turn the main point in the case, and that upon which the case below was decided, namely, whether the provisions of section 2750 of the Compiled Laws of New Mexico (1884), copied, with substantial accuracy, at page 102 of the record, when applied to such a deed as is the foundation of the action in the present case (found in the record at page 44), and which contains a covenant of express warranty, do, as a matter of law, raise such an implied covenant of seisin, guaranteeing a perfect title, and is broken, and thus becomes the predicate of an action of covenant where there was no eviction; and, also, whether the covenant so implied from section 2750, if any covenant is implied, extends beyond a covenant against all defects of title "*made or suffered to be made by the grantor or by persons claiming the same under him?*"

It is proper at the outset to remark that section 2750 of the Compiled Laws of New Mexico, is substantially a copy of section 75 of Brightly's Purdon's Digest of the Laws of Pennsylvania, page 472, and which section 75, quoted above, is section 6 of the act of 28th of May, 1715. This Pennsylvania statute is the *first* act of the kind enacted in the United States, and is copied from the English statute of 6 Anne, c. 35, section 30. (See Rawle on Covenants, fifth edition, section 285.) And this section 2750 of the laws of New Mexico is also, in substance, the same as the statutes above cited.

Next it is to be, preliminarily, observed that this statute which has been, in substance, adopted only in Pennsylvania, Delaware, Illinois, Indiana, Missouri, Mississippi, and Alabama, (4 Kent, 473,) is by courts and jurists condemned, with substantial unanimity, as dangerous when extended beyond implying a covenant *against acts of the grantor*, and when made to be a general covenant of seisin, &c. Regarding such statutes Kent says (4 Kent, 474):

"But beyond that point (covenant against acts of grantor) there is great danger of imposition upon the ignorant and unwary if any covenant be *implied* that is not stipulated in clear precise terms."

See the same thing regarding the danger of such legislation in cases cited in Rawle on Covenants, 461, section 286, (5th Ed.)

Because of the dangers here pointed out the courts do not construe these statutes freely in the direction of enlarging the grantor's liability beyond the express language of the instrument which he executes, but construe them, as we shall see, strictly as being in derogation of common law, common right, and dangerous.

Because they are often blended in the authorities we will, in the main, present together the authorities on the

two proposition, to wit, (1) that when there are express covenants of warranty, or the like, in the deed, there the implied or statutory covenant of seisin, contemplated by such statutes as said section 2750, does not arise; and (2) that under such statutes as said section 2750, when the implied statutory covenant *does* arise, it is limited in its effect to covenanting against the *acts of the grantor.*

On this point, and commenting on all such statutes as the present, Rawle in section 285, pages 457, 458, (fifth edition,) says, speaking of the above quoted section 75 of the PENNSYLVANIA Compiled Statutes:

"But in the subsequent case of Gratz *v.* Ewalt (2 Binney, 98) the construction of the statute was carefully considered; and it was held that the first covenant" (named in the sixth section of the said Pennsylvania act of May 28th, 1715, to wit, that the grantor was seized of an indefeasible estate in fee-simple) "which, standing by itself, would be unlimited, must be taken in connection with the subsequent one against encumbrances, which is *limited,* and, consequently, that *none* of the covenants implied by the statute were to be considered as extending *beyond the acts of the covenantor;* and the construction thus given has never been departed from in Pennsylvania." (Citing 11 Sergeant and Rawle, 101; 58 Pa. State, 484; 3 Pa., Old Pa., not Pa. St., 323; 1 Rawle, 377.)

The author proceeds: "And it is said by Chancellor Kent, (4 Comm., 474,) that 'by the decision in Gratz *v.* Ewalt, the words of the statute are divested of all *dangerous* tendency, *and that it will equally apply to the same statutory language in other States.*'"

The same thing is held in Shaffer *v.* Greer, 87 Pa. St., 370.

The 29th section of the ALABAMA act of 1805 is copied from the Pennsylvania statute, and is reimbodied in the

Revised Statutes of 1823 and 1852, and the Codes of 1867 and 1876. In this State in the cases of—

Roebuck *v.* Dupuy, 2 Alabama, 541.

Stewart *v.* Anderson, 10 Alabama, 504,

it is held regarding this statute that—

"The words *grant*, *bargain*, and *sell* do *not*, under the 20th section of the act of 1803, respecting conveyances, import an absolute or general covenant of seisin against encumbrances and for quiet enjoyment, *but amount to a covenant only for acts done or suffered by the grantor and his heirs.*"

The similar statute in ARKANSAS of 1848, found in the Revised Statutes, page 264, has, in that State, received the same construction as was given to the Pennsylvania statute in Gratz *v.* Ewalt, *supra*. This is decided in—

Winston *v.* Vaughan, 22 Arkansas, 72.

See, also—

Brodie *v.* Watkins, 31 Arkansas, 319.

Section 1113 of the Civil Code of CALIFORNIA of 1876, in substance provides that from the use of the word "grant" in a conveyance of a fee-simple, the covenants implied are, first, that previous to the execution of the conveyance, the *grantor* had not conveyed the same estate to any other person; and, second, the estate at the time of the grant was free from encumbrances *by act of the grantor*. And under this statute the California courts hold that, to here quote from Ryan *v.* Swayne, 56 California, 616:

"The fact that the title to the land conveyed by the grant, bargain, and sale deed stands in a third person *does not constitute a breach of the covenants implied in such deed;* nor does such fact constitute a breach of an express covenant for quiet enjoyment contained in the deed *if the grantee enters and remains in the undisturbed possession of the land.*"

This is, in passing, cited for its bearing on the effect, in this case, of no eviction.

The ILLINOIS statute upon this subject is copied from the statute of Pennsylvania; was contained in the Revised Statutes of 1839 and 1845; was re-enacted in 1872, Illinois Public Laws, page 282, section 2; and again in the Revised Statutes of 1883, page 280.

In the case of Finley *et al. v.* Steele. 23 Illinois, 56, what is decided on a review of the authorities is thus expressed in the head note:

"The covenant created by the use of the words grant, bargain, and sell under the 11th section of chapter 24 of the Revised Statutes, *is not operative when the grantor has inserted other covenants in his deed.*

"*The enactment is in derogation of common law, and should be construed strictly.*"

An extract from the opinion of Walker, J., who delivered the opinion in that case, will be useful as showing the state of the law under similar statutes in the States of Mississippi and Missouri. The court says:

"This provision of our statute is a copy from the Pennsylvania act, which has likewise been adopted in Mississippi without any change. In the latter-named State, the court, in giving the act a construction, in the case of Weems *v.* McCaughan, (7 Smede and Marshal, 427,) where a deed like the one in controversy in this case contained the words of the statute, *and a covenant of general warranty*, held that 'the covenants raised by law from the use of particular words, are only intended to be operative where the parties themselves *have omitted to insert covenants. But where the party declares how far he will be bound to warrant, that is the extent of his covenant.*'

"In Missouri, in the case of Collier *v.* Gamble, 10 Mo., 473, the court, under a similar statute, after a cereful review of the English and Pennsylvania authorities, held, where a purchaser took an express general covenant to warrant and defend against all titles, particularly against a certain mortgage previously executed by the grantor,

which had been discharged by the grantee, and, to recover the money paid for that purpose, he had instituted the suit on this statutory covenant, that there was no breach of the covenant of warranty, and the mortgage could not come within the scope of the statutory covenant against encumbrances, *because the grantor, having covenanted to warrant and defend against the mortgage, he could not be supposed to have intended to covenant against its existence.* These decisions *limit* the operation of the covenants created by the use of these words to deeds in which they are employed *where the grantor has failed to insert other covenants embracing the statutory covenants.*"

The law is thoroughly settled that in absence of fraud and of special statute, vendor's liability regarding title to the land conveyed will never be *extended beyond the covenants he has made* in his deed. See Gouverneur *v.* Elmendorf, 6 Johnson's Chancery, 79; Chesterman *v.* Gardner, 5 Johnson's Chancery, 29; Raymond *v.* Raymond, 10 Cushing, 134; Buckner *v.* Street, 15 Federal Reporter, 368, and cases cited. And that where there is a special warranty against grantor's own acts, no covenant of seisin or general warranty can be implied. (See the same cases; also, Hale *v.* Finch, 104 U. S. R., 269; Peters *v.* Bowman, 98 U. S., 56.)

To the same general effect are the following cases:

In Vanderkarr *v.* Same, 11 Johnson, 122, the action was, as in the present case, upon an alleged implied covenant of seisin where the deed contained a covenant of warranty, and the court held what the head notes state, in these words:

"Where there is an express covenant in a deed, it takes away all implied covenants. A general covenant of warranty in a deed does not imply a covenant of seisin, nor can the want of seisin in the grantor, or that he had no such lands, &c., be assigned as a breach of the covenant of warranty; nor can the plaintiff maintain an action for the breach of covenant of warranty without alleging and proving lawful eviction."

ple, without adding terms indicating a purpose to covenant for a full fee-simple title, is or is not satisfied by the fact that the covenantor was possessed or seized at the time of his grant; or whether, on the other hand, such a covenant of seisin guarantees a full and clear title.

An exhibition of this conflict of authority is well expressed in the following, from 2d Waite's Actions and Defences, 374:

"In England, and in *most* of the States of the Union, a covenant of *seisin*, or *lawful seisin*, is a covenant not only that the grantor is seized, but that he is seized of an *indefeasible* estate; in other words, it is a covenant for the *title*, in its technical sense. Cooke *v.* Fowns, 1 Keble, 95; Gray *v.* Briscoe, Noy, 142; Young *v.* Raincock, 7 C. B., 310; Rawle on Covenants for Title, 56; Pierce *v.* Johnson, 4 Vt., 53; Mills *v.* Catlin, 22 id., 106; Lockwood *v.* Sturdevant, 6 Conn., 385; Parker *v.* Brown, 15 N. H., 186; but see 3 Washb. on Real Prop., 655, 656.

"By the courts of some of the States it is, however, held, that a covenant that one is 'lawfully seized,' or has 'a good and sufficient seisin,' does not require that the grantor should have an *indefeasible* estate, and is not broken if an *actual* seisin, no matter how tortious, provided it be under color of title, be given to the purchaser. Marston *v.* Hoobs, 2 Mass., 439; Bearce *v.* Jackson, 4 id., 408; Raymond *v.* Raymond, 10 Cush., 134; Follett *v.* Grant, 5 Allen, 175; Boothby *v.* Hathaway, 20 Me., 255; Wilson *v.* Widenham, 51 id., 567; Backus *v.* McCoy, 3 Ohio, 211; Devore *v.* Sunderland, 17 id., 60; Watts *v.* Parker, 27 Ill., 229; Rawle on Covenants for Title, 56, 58 and notes. Most of the cases last cited decide that *if there is an actual seisin the covenant is not broken at all; that there has been and can be no breach, and that the covenant will have been fully answered, even though the purchaser should afterwards be evicted.*"

But when to the covenant of "seisin," or the covenant "for lawful seisin," the words "in fee-simple," or "seized of an indefeasible estate," are added, there all the authorities in this country hold the latter covenant to be a covenant for a *perfect* title.

Speaking of a covenant stipulating that the covenantor is "seized of an *indefeasible* estate," Mr. Washburn says (2 Washburn on Real Estate, side page 655, 656):

"The effect of the latter covenant in this country, when expressly made, is *uniformly* held to extend further than that of the ordinary covenant of seisin, and to cover *an existing outstanding title adverse to that of the grantor.*"

The result of what has now been said on this point is, that, according to the express letter of the covenant of seisin provided for in said section 2750 (R., 102), the words of which are—

"That the grantor at the time of the execution of the conveyance is possessed of an irrevocable possession in fee-simple to the property conveyed"—

such covenant becomes, and is one which when standing alone (according to all American decisions) is an absolute covenant for a perfect fee-simple title.

Now the next covenant provided for in section 2750 (R., 102) is one which says that "the said real estate, at the time of the execution of the said conveyance, is free from all encumbrances *made or suffered to be made by the grantor, or by any person claiming the same under him.*" Here there is an express *limitation* of the covenant of warranty to its being a covenant *against the acts of the grantor alone.*

From this it is seen that any interpretation other than that given to this section in the cases which follow and adopt Grantz *v.* Ewalt (2 Binney) results in absolute absurdity.

This is so because, if the first covenant provided for in section 2750 is one against *all* encumbrances and *all* acts of *all* parties whomsoever, and for a *perfect* title, as the plaintiff in error insists, then after such a covenant in the deed has been introduced, by the implications of this statute, to add one carefully *limiting* the obligation

of the covenantor to encumbrances *by his own act*, is absurd and senseless. It makes the covenants directly contradictory and repugnant, and destroys utterly the harmony of the provisions of this important statute.

And so every State of the Union that has such a statute has held, as we had seen, except possibly Missouri.

It seems to us, in view of these and other considerations now suggested, that it is impossible that this court should not adopt the interpretation of this statute which it received in the case of Grantz *v.* Ewalt, and which makes the covenants of Lewis only to be covenants *against defects of title created by the act of Lewis.* This being so, the judgment below for this reason must be affirmed.

III.

We now turn to the question whether the record discloses any eviction or disturbance of the plaintiff's title, actual or constructive, such as would entitle him to recover, if at all, beyond nominal damages, either under express covenant of warranty, (at the bottom of page 44,) or under any implied covenant of seisin, if any such there be. By reference to page 21 of the record, and the other evidences in the case, it will be seen that the plaintiff in error, Douglass, admitted that he was put into possession of the land, and that he has never been disturbed in the possession, and in effect admits that he never had made demand for restoration of the moneys, nor had any demand been made on him to surrender the land prior to this suit; and without any offer to rescind or to restore the land he brings suit, and now holds both the land and a judgment for its full value.

The hardship of allowing a vendee, in full and unassailed possession of the premises bought, to defeat the recovery of the stipulated purchase-money is well expressed in the quotation from Chancellor Kent at the

end of the opinion of this court in Peters *v.* Bowman, 98 U. S., 61, and is in these words:

"Chancellor Kent well says 'it would lead to the greatest inconvenience, and perhaps abuse, if a purchaser in actual possession of land, and when no third person asserts, or takes any measures to assert, a hostile claim, can be permitted, on a suggestion of a defect or failure of title, and of the principles of *quia timet*, to stop the payment of the purchase-money, and of all proceedings at law to recover it.' (Abbott *v.* Allen, *supra*, 2 Johnson's Chancery Reports, 519.)"

The point which we now submit is that where a vendee is in full and unassailed possession of the premises purchased, there neither upon the covenant of seisin nor the covenant against encumbrances can the vendee recover beyond nominal damages. In support of this point we cannot do better than make the following extract from 1st Smith's Leading Cases, pages 174 and 175—notes by Hare and Wallace, to the principal case, Spencer's:

"The conclusion of the Supreme Court of Ohio, with regard to the covenants for *seisin*, and against incumbrances, seems to be substantially just, although some steps in the reasoning by which it was attained, may be doubted. Two different constructions may be put on these covenants, each consistent with itself, though not with the other. Under the one they are viewed as *absolute*, and present engagements, that the grantor has a *good and unincumbered* title, and are consequently broken at once, if his title be bad or incumbered, although *no loss* has been sustained by the covenantor. But they are regarded under the *other*, as substantially covenants of *indemnity*, and as undertaking, *not that the title of the covenantor is absolutely good*, but that the grantee shall be saved *harmless*, if it prove defective. The hardship of making the vendor answerable, in cases where the vendee has not been *injured*, has induced the courts to recede from the former construction, *as it regards the covenant against encumbrances*, and to hold that the vendee cannot

found a right to actual damages, on the *mere existence* of an encumbrance, and will be confined to a *nominal* recovery, unless he has sustained *some real injury.* Prescott *v.* Truman, 4 Mass., 627; Wyman *v.* Ballard, 12 *Id.*, 304; Sprague *v.* Baker, 17 *Id.*, 588; Tuft *v.* Adams, 8 Pick., 457; Liffingwell *v.* Elliott, *Ib.*, 457; Harlow *v.* Thomas, 15 *Ib.*, 66; Delevergue *v.* Norris, 7 Johnson, 358; Bean *v.* Mayo, 5 Maine, 94; Richardson *v.* Dorr, 5 Vermont, 9; Stannard *v.* Eldridge, 16 *Id.*, 254; Collier *v.* Gamble, 1 Missouri, 467; Pomeroy *v.* Burnet, 8 Blackford, 142; Weisler *v.* Hicks, 5 *Id.*, 100. *The reasoning on which these decisions proceed would seem equally applicable to the covenant for seisin, when the grantee goes into possession under the deed.* And as it can serve no good purpose to give a right of suit for *mere nominal damages*, it is obviously better to adopt the construction followed in Ohio, and hold that *both these covenants are technically, as well as actually, covenants of indemnity, which removes all doubt as to the right of the heir or assignee to sue for an eviction occurring after the dissent or assigment.*"

As to this rule or measure of damages where the breach of covenant of seisin is merely technical, and there is neither an offer to rescind, nor disturbance of possession, and where no damages have been sustained, see further 14 Ind., 44; 5 Blackford 232; 17 Ind., 99; 9 Ind., 13; 14 Ind., 164; Rawle on Covenant, (5th Ed.,) Sec. 176 and notes.

And here we beg that the court will carefully notice what are the controlling features of this case bearing on the measure of damages. These are (1) that the title of Lewis was a grant from Mexico under which uninterrupted possession was held for over fifty years; (R. 34, 35, 36, 39, 43;) that (2) this full absolute and peaceable possession was, at the sale to Douglass, fully delivered to him, and he has ever since had the same unchallenged and now holds it; (3) that he, Douglass, never *demanded or tendered* a rescission of the said sale and conveyance, but now holds said land peaceably and fully; that (4) the

District Court below put the plaintiff, Douglass, under no sort of terms or conditions as to cancelling said grant and restoring said land before judgment; but, on the contrary, rendered judgment for whole amount of the purchase-money.

Under this state of the fact and of the decisions, we most respectfully submit that the application of this rule above stated from Wallace's and Hare's Notes, which is applicable to covenants of *warranty*, where no injury has been sustained, must, in reason and justice, as these learned authorities say, be equally applied to the covenant of *seisin* where the covenantee chooses to retain possession, hold on to the lands bought, and where his possession and title have remained unchallenged.

We, therefore, conclude this brief by insisting that if the court should reach the conclusion, as we respectfully submit it cannot, that there is an implied covenant of seisin in the present case, warranting a *perfect* title in fee-simple, yet even in that event, the court must affirm the judgment below, reversing the District Court, because the recovery of the entire purchase-money under such conditions was against the law.

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